No. 16-1116	*** CAPITAL CASE ***
Title:	Charlotte Jenkins, Warden, Petitioner
	v.
	Percy Hutton
Docketed:	March 16, 2017
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(13-3968)
Decision Date:	October 12, 2016
Rehearing Denied:	December 13, 2016

DATE	PROCEEDINGS AND ORDERS
Mar 10 2017	Petition for a writ of certiorari filed. (Response due April 17, 2017)
Mar 10 2017	Appendix of Charlotte Jenkins, Warden filed.
Apr 05 2017	Order extending time to file response to petition to and including May 1, 2017.
May 01 2017	Brief of respondent Percy Hutton in opposition filed.
May 01 2017	Motion for leave to proceed in forma pauperis filed by respondent Percy Hutton.
May 15 2017	Reply of petitioner Charlotte Jenkins, Warden filed. (Distributed)
May 16 2017	DISTRIBUTED for Conference of June 1, 2017.
Jun 05 2017	DISTRIBUTED for Conference of June 8, 2017.
Jun 12 2017	DISTRIBUTED for Conference of June 15, 2017.
Jun 19 2017	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 19 2017	Petition GRANTED. Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Jul 14 2017	Petition for Rehearing filed.
Aug 03 2017	DISTRIBUTED.
Aug 25 2017	Rehearing DENIED.
Aug 25 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS.

16-1116

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No. 16-___

In the Supreme Court of the United States

CHARLOTTE JENKINS, Warden,

Petitioner,

v.

PERCY HUTTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

An Ohio jury determined (1) that two aggravating circumstances made Percy Hutton death-penalty eligible at the *guilt* phase of his trial, and (2) that the aggravating circumstances outweighed the mitigating factors at the *penalty* phase. In a collateral attack, Hutton challenged the penalty-phase instructions on the ground that they failed to clarify that the aggravating circumstances were the same ones that the jury had found at the guilt phase. The Warden argued that Hutton defaulted this claim, and that the state courts' independent reweighing of the circumstances cured any alleged weighing-stage error.

The Sixth Circuit granted Hutton relief. On its own initiative, the court invoked the miscarriage-of-justice exception to procedural default, which applies only to individuals who can show that they are "actually innocent" of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). The court also found that appellate reweighing could not cure the alleged instructional error. To do so, it extended *Ring v. Arizona*, 536 U.S. 584 (2002)—which held that a jury must find the aggravating factors that make a defendant death-penalty *eligible*—into the *weighing* stage. This case presents two questions:

1. Did the Sixth Circuit properly hold, on its own initiative, that Hutton could overcome his procedural default under *Sawyer*'s actual-innocence exception?

2. Did the Sixth Circuit properly hold that judicial reweighing cannot cure errors at the weighing stage of a capital trial by extending *Ring*'s standards from the eligibility phase into that weighing phase?

LIST OF PARTIES

The Petitioner is Charlotte Jenkins, the Warden of the Chillicothe Correctional Institution. Jenkins is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

The Respondent is Percy Hutton, an inmate imprisoned at the Chillicothe Correctional Institution.

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The Sixth Circuit's unpublished en banc denial is reproduced at Pet. App. 1a. Its decision, *Hutton v. Mitchell*, 839 F.3d 486 (6th Cir. 2016), is reproduced at Pet. App. 2a-53a. The district court's unpublished decision, *Hutton v. Mitchell*, No. 1:05-CV-2391, 2013 WL 2476333 (N.D. Ohio June 7, 2013), is reproduced at Pet. App. 54a-216a.

The Ohio intermediate appellate court's initial decision on direct appeal, *State v. Hutton*, No. 51704, 1988 WL 39276 (Ohio Ct. App. Apr. 28, 1988), is reproduced at Pet. App. 317a-424a. The Ohio Supreme Court's review of that decision, *State v. Hutton*, 559 N.E.2d 432 (Ohio 1990), is reproduced at Pet. App. 282a-316a. The Ohio intermediate appellate court's decision on remand from the Ohio Supreme Court, *State v. Hutton*, 594 N.E.2d 692 (Ohio Ct. App. 1991), is reproduced at Pet App. 272a-279a. The Ohio Supreme Court's opinion affirming that decision, *State v. Hutton*, 797 N.E.2d 948 (Ohio 2003), is reproduced at Pet. App. 238a-267a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its decision on October 12, 2016. On December 13, 2016, it denied rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In September 1985, Percy Hutton avenged the alleged theft of a sewing machine and cash by kidnapping and killing Derek "Ricky" Mitchell, and by kidnapping and attempting to kill Samuel Simmons, Jr. Pet. App. 239a-245a. At the *guilt phase* of his trial, a jury convicted Hutton of aggravated murder and found two aggravating circumstances that triggered Hutton's death-penalty eligibility (that Hutton committed the murder while kidnapping Mitchell and in a course of conduct involving the attempted murder of Simmons). Trial Tr., R.16-29, PageID#7697-700. Thirty years later, a divided Sixth Circuit granted Hutton habeas relief on the ground that the state trial court had erred when it failed to restate what the aggravating circumstances were for the jury at the *penalty phase* of Hutton's trial (where the jury balanced the aggravating and mitigating circumstances). Pet. App. 25a.

The Sixth Circuit could grant this relief only by surmounting two obstacles. *First*, Hutton procedurally defaulted his jury-instruction claim. The Sixth Circuit reached the defaulted claim by invoking—on its own initiative—an exception to procedural default that is reserved for "extraordinary" cases: the actual-innocence exception from *Sawyer v. Whitley*, 505 U.S.

333 (1992). The court relied on this exception even though Hutton had never argued that he was "actually innocent" of the death penalty, and even though "Hutton's eligibility for the death penalty is indisputable" given the jury's aggravating-circumstance findings at the guilt phase of his trial. Pet. App. 48a (Rogers, J., dissenting).

Second, the state appellate courts had reweighed the aggravating and mitigating circumstances and found the death penalty appropriate. That cured any penalty-stage instructional errors under *Clemons v. Mississippi*, 494 U.S. 738 (1990). To reject *Clemons*, the Sixth Circuit was forced to extend into the *weighing stage* of a capital trial this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)—which required the jury to find the aggravating circumstances that trigger the death penalty at the *eligibility stage*.

The Sixth Circuit's decision on both issues warrants this Court's review because it conflicts with the Court's cases and with cases from other courts.

I. THE STATE PROCEEDINGS

A. Ohio Juries Decide At The Guilt Phase Whether An Aggravating Factor Makes A Defendant Death-Penalty Eligible

Ohio's capital-sentencing system, both in 1985 and today, involves a bifurcated trial. The jury finds the aggravating circumstances that make a defendant death-penalty eligible at the *guilt phase*. The jury weighs those same circumstances against mitigating factors at the *penalty phase*. And the state courts provide a further check by reexamining a jury's deci-

sion to impose the death penalty (but not its decision to impose a life sentence).

Guilt Phase. The jury decides the defendant's eligibility for the death penalty at the first phase of trial (the "guilt phase"). The indictment must charge the defendant with aggravated murder and include at least one aggravating circumstance (also known as a "capital specification"). Ohio Rev. Code § 2929.03(A)-(B) (1985); *id.* § 2929.04(A) (1985) (listing aggravating circumstances). The prosecution must prove the aggravating circumstance beyond a reasonable doubt. *Id.* § 2929.03(B) (1985). The defendant becomes eligible for the death penalty only if the jury finds the defendant guilty of *both* aggravated murder *and* at least one aggravating circumstance. *Id.* § 2929.03(C)(2) (1985).

Penalty Phase. If the jury convicts the defendant of aggravated murder and at least one aggravating circumstance, the case proceeds to the penalty phase. There, the prosecution must prove beyond a reasonable doubt "that the aggravating circumstances the defendant was found guilty of committing" *at the guilt phase* outweigh any mitigating factors. *Id.* § 2929.03(D)(1) (1985). The defendant may present "evidence of any factors in mitigation," but the jury may consider *only* the aggravating circumstances found at the guilt phase. *Id.* The jury recommends a death sentence only if it finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. *Id.* § 2929.03(D)(2) (1985). Otherwise, it must recommend life imprisonment. *Id.* If the jury recommends life, the trial court *cannot* impose a death sentence. *Id.*

If the jury recommends death, the court must conduct an independent review. *Id.* § 2929.03(D)(3) (1985). The court may impose a death sentence only if it agrees with the jury, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors. *Id.* If it does not make that finding, it must impose a life sentence despite the jury's recommended death sentence. *Id.*

Appeal. In 1985, Ohio law required "the court of appeals and the Supreme Court . . . [to] review the sentence of death at the same time that they review[ed] the other issues in the case." *Id.* § 2929.05(A) (1985). Those courts were required to "review and independently weigh all of the facts and other evidence disclosed in the record in the case . . . to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case." *Id.* They were permitted to "affirm a sentence of death only if" they were "persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh[ed] the mitigating factors present in the case." *Id.* (Ohio's modern process is substantially the same, except that capital cases are now appealed directly to the Ohio Supreme Court. Ohio Rev. Code §§ 2929.05, 2953.02 (2017).)

B. A Jury Convicted Hutton Of Murder And Two Aggravating Circumstances, And He Was Sentenced To Death

Ohio indicted Hutton on two counts of aggravated murder, two counts of kidnapping, and one count of attempted murder. Pet. App. 244a-245a. Each aggravated-murder count carried two aggravating cir-

cumstances (or capital specifications): a course-of-conduct specification for killing Mitchell while attempting to kill Simmons, Ohio Rev. Code § 2929.04(A)(5) (1985), and a "felony murder" specification for kidnapping Mitchell before killing him, Ohio Rev. Code § 2929.04(A)(7) (1985). Pet. App. 245a. The counts also carried noncapital firearm specifications. *Id.*

At the *guilt* phase, the prosecutor explained the trial phases to the jury. During voir dire, the prosecutor noted that a guilt finding for the course-of-conduct and felony-murder circumstances would trigger a penalty phase. Trial Tr., R.16-24, PageID#6119-21. At that phase, the prosecutor continued, the jury would ask whether "Ohio [had] been able to prove that the aggravating circumstances of the crime, those things that we are talking about, those specifications[,] outweigh beyond a reasonable doubt whatever mitigating factors the Jury should decide that there are." *Id.*, PageID#6121. The prosecutor's opening statements reiterated that those two aggravating circumstances were "the specifications which trigger the possibility of the death penalty." *Id.*, PageID#6257.

The trial court instructed the jury on its responsibilities for guilt-phase findings. Trial Tr., R.16-29, PageID#7650-89. It noted that "as to each count and each specification there must be a finding by the Jury." *Id.*, PageID#7669. The jury found Hutton guilty on all counts, including the two death-penalty aggravating circumstances, making him death-penalty eligible. *Id.*, PageID#7697-700.

At the *penalty* phase, the prosecutor noted that the "givens" were "those aggravating circumstances that you found to exist in the first phase." *Id.*, PageID#7729. He added that the jury would "be only addressing . . . two of the specifications"—the course-of-conduct and felony-murder ones. *Id.*, PageID#7729-30. And he indicated that the jury should ask: "Do the aggravating circumstances of the crime, which you have already found to exist beyond a reasonable doubt, do they outweigh whatever mitigating factors you decide there are beyond a reasonable doubt here in this phase of the trial?" *Id.*, PageID#7731.

The trial court's penalty-phase instructions noted that the prosecution must prove "that the aggravating circumstances, *of which the Defendant was found guilty*, outweigh the factors in mitigation of imposing the death sentence." *Id.*, PageID#7767 (emphasis added). The court did not, however, further clarify that those aggravating circumstances were the two that the jury had already found at the guilt phase. "[T]he Court afforded counsel the opportunity to make recommendations for additions or deletions to the Court's charge," but Hutton's counsel "had no objections." *Id.*, PageID#7772.

Ultimately, the jury found "that the aggravating circumstances which the Defendant, Percy Hutton, was found guilty of committing, [were] sufficient to outweigh the mitigating factors presented." *Id.*, PageID#7777-78. It recommended a death sentence. *Id.* The trial court imposed that sentence. Pet. App. 245a.

C. The Ohio Supreme Court Affirmed Hutton's Conviction And Sentence

1. Hutton appealed. An intermediate appellate court reversed his convictions, Pet. App. 317a-424a, but the Ohio Supreme Court reversed that decision, affirmed Hutton's convictions, and remanded to the court of appeals for an independent review of Hutton's capital sentence, Pet. App. 282a-316a.

In the Ohio Supreme Court, three justices partially dissented on grounds that had not been raised at trial or on appeal. Pet. App. 313a-316a (Brown, J., dissenting). The dissent would have found "a plain error in the jury instructions" due to the trial court's failure "to tell the jury what the 'aggravating circumstances' were" at the penalty phase. Pet. App. 313a, 315a. Because the penalty-phase instructions did not *restate* the aggravating circumstances that the jury had found during the guilt phase, the dissent felt that "the jury [had been] left 'with untrammeled discretion to impose or withhold the death penalty.'" Pet. App. 316a (quoting *Gregg v. Georgia*, 428 U.S. 153, 196 n.47 (1976)). The majority "decline[d] to address" this issue because "Hutton specifically declined to object to the instructions at trial, and ha[d] not raised or briefed" the claim. Pet. App. 286a n.1.

On remand, the intermediate appellate court reweighed the circumstances, and affirmed Hutton's death sentence. Pet. App. 272a-281a.

2. Hutton applied to reopen his direct appeal based on the alleged ineffective assistance of his appellate counsel. In that proceeding (called a "Rule 26(B)" application), Hutton claimed that appellate

counsel had been ineffective for failing to assign error to the trial court's penalty-phase instructions. Pet. App. 268a-271a. An Ohio appellate court denied the application. *Id.*

3. In 2000, Hutton filed a delayed appeal from the 1991 independent reweighing of his sentence. Pet. App. 69a. That appeal was consolidated with an appeal from his Rule 26(B) denial. Pet. App. 247a.

The Ohio Supreme Court affirmed Hutton's sentence. Pet. App. 238a-267a. It held that the evidence supported the jury's findings of two aggravators, and that those circumstances outweighed the mitigating factors. Pet. App. 259a-265a. The court also rejected Hutton's ineffective-assistance claim. Pet. App. 251a-259a. It held that counsel's "[f]ailure to raise the waived instructional issue"—which would have been subject to plain-error review—"was not deficient performance." Pet. App. 255a.

4. Hutton also filed two petitions for post-conviction relief. The state appellate court denied those petitions. Pet. App. 218a-225a, 227a-237a. The Ohio Supreme Court denied discretionary review in both instances. Pet. App. 217a, 226a.

II. THE FEDERAL PROCEEDINGS

A. The District Court Denied Hutton Relief

Hutton filed a 28 U.S.C. § 2254 petition. Pet. App. 82a-84a. He asserted, among other claims, that "[t]he trial court failed to define the term 'aggravating factor' for the jury prior to its deliberations in the penalty phase" (referred to in this brief as "the jury-instruction claim"), Pet. App. 85a, and that appellate

counsel had been ineffective for failing to raise that claim, Pet. App. 98a-99a, 201a. Hutton conceded that the jury-instruction claim was procedurally defaulted because he failed to raise it on direct appeal, but attempted to prove "cause and prejudice" to excuse the default based on the alleged ineffective assistance of appellate counsel. Pet. App. 201a.

The district court denied relief. It rejected Hutton's jury-instruction claim as both procedurally defaulted and meritless. *Id.* On the default, the court held that Hutton's ineffective-assistance claim did not constitute "cause" to overcome the procedural bar. *Id.*; *see also* Pet. App. 162a-164a. On the merits, the district court held that, even if an instructional error had occurred, "the error was cured by the court of appeals' reweighing of mitigating and aggravating circumstances." Pet. App. 203a.

B. The Sixth Circuit Reversed And Granted A Writ Of Habeas Corpus

A divided Sixth Circuit reversed the district court's decision on Hutton's jury-instruction claim. Pet. App. 2a-53a. Writing for the court, Judge Donald agreed that Hutton had defaulted this claim. Pet. App. 18a. Yet the court excused this procedural default based on an exception that Hutton himself had not advanced—the "'fundamental miscarriage of justice'" exception. Pet. App. 19a (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

The court acknowledged that Hutton had waived any miscarriage-of-justice argument. Pet. App. 20a. Yet it overlooked that waiver, and concluded that Hutton satisfied the "actual innocence" test from

Sawyer. Pet. App. 20a-25a. *Sawyer* holds that a petitioner may overcome the default of a claim challenging a capital sentence if the petitioner "show[s] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." 505 U.S. at 336. The Sixth Circuit found this test satisfied because the penalty-phase instructions had not explained to the jury that the aggravating circumstances that it had already found at the guilt phase were the ones that it should weigh against the mitigating factors. Pet. App. 24a-25a. Given the absence of such an instruction, the court believed, "[t]here [was] nothing in the record that indicate[d] that the jury's finding that the aggravating circumstances outweighed the mitigating ones was actually based on a review of any valid aggravating circumstances." Pet. App. 24a. The potential for the jury to have relied on erroneous aggravating circumstances at this weighing stage, the court added, satisfied *Sawyer*'s actual-innocence exception. Pet. App. 25a.

The court also held that the Ohio appellate courts' independent reweighing of the aggravating and mitigating circumstances could not overcome the alleged error. Pet. App. 20a-21a, 25a. It acknowledged this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), which held that a federal court may uphold a death sentence based on an improperly defined aggravating circumstance if a state appellate court independently reweighs the aggravating and mitigating circumstances. Pet. App. 23a. The court distinguished *Clemons*, however, because it believed

that Hutton's jury was not merely given improper guidance as to the aggravating circumstances; rather, it "was precluded from making the necessary findings of aggravating circumstances *in the first place*." Pet. App. 23a-24a. That, the court reasoned, triggered this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016)—both of which held that the Sixth Amendment requires a jury, not a judge, to find the aggravating circumstances that make a defendant death-penalty eligible. Pet. App. 22a-24a.

The court affirmed on the other claims, and remanded the case "with instructions to order Hutton's release from custody unless the state grants a new sentencing hearing within 180 days from the date that the mandate issues." Pet. App. 36a.

Judge Merritt filed a concurrence. The concurrence agreed with the court's miscarriage-of-justice analysis and with its ultimate disposition. Pet. App. 43a. It also would have held that no procedural default had occurred, Pet. App. 36a-38a, and that any default was excused by Hutton's allegedly meritorious ineffective-assistance claims, Pet. App. 42a.

Dissenting, Judge Rogers would have affirmed on all claims. While agreeing with the court that Hutton's claim was defaulted, the dissent disagreed that the actual-innocence exception applied. Pet. App. 45a (Rogers, J., dissenting). "Not only does that exception to procedural default not apply in this case," the dissent noted, "but Hutton never even raised the exception in the district court or on appeal." *Id.* It criticized the majority for "lightly brush[ing] aside"

"[t]he procedural rules that constrain federal-court oversight of state criminal proceedings." *Id.*

Even if Hutton had raised an actual-innocence argument, the dissent concluded that the argument would fail. Pet. App. 48a-51a. His "eligibility for the death penalty is indisputable," the dissent reasoned, because the jury convicted him of two aggravating circumstances during the *guilt* phase. Pet. App. 48a-49a. Any error in the *penalty* phase, where the jury weighed the aggravating circumstances that it had already found against the mitigating ones, could not have affected Hutton's eligibility for his sentence. Pet. App. 49a-50a. This fact also distinguished *Ring* and *Hurst*. Pet. App. 51a-52a. As a result, the Constitution allowed the Ohio courts to cure any purported jury-instruction error by "conclud[ing] that the death sentence was appropriate after reweighing the aggravating circumstances against the mitigating evidence." Pet. App. 53a.

The Sixth Circuit denied rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The Court should grant review for two reasons. *First*, the Sixth Circuit's actual-innocence analysis conflicts with this Court's cases and with cases from many circuits regarding the "actual-innocence" exception to the procedural-default rule. *Second*, the Sixth Circuit's holding that *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), barred the state courts from using appellate reweighing to fix *weighing-stage* errors conflicts with

many decisions that have limited *Hurst* and *Ring* to the *eligibility stage* of a capital trial.

I. The Decision Below Conflicts With This Court's Cases And Creates A Circuit Split On The Actual-Innocence Exception

The Court should grant review because the Sixth Circuit's dramatic (and *sua sponte*) expansion of the actual-innocence exception conflicts with this Court's cases and with cases from other circuits.

A. The Sixth Circuit's Decision Conflicts With This Court's Cases

This Court has cabined the actual-innocence exception to extraordinary cases, but the decision below greatly expands that exception.

1. The actual-innocence exception applies only if a petitioner can show *factual* innocence of the elements required for the death penalty

a. Out of "concerns for the finality of state judgments of conviction and the 'significant costs of federal habeas review,'" federal courts generally cannot review defaulted claims unless a petitioner can show cause and prejudice for the default. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (citation omitted). This cause-and-prejudice standard ensures that state trials remain "decisive and portentous event[s]." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Although the Court has expressed confidence that the cause-and-prejudice standard will protect against "'a fundamentally unjust incarceration,'" it has declined to "pretend that this will always be true."

Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (citation omitted). It has thus reserved for "extraordinary case[s]" one exception: A federal court may excuse a default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496. This actual-innocence exception "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). It may apply if a petitioner alleges innocence of the underlying crime of which the petitioner was convicted, *see Schlup v. Delo*, 513 U.S. 298 (1995), or if a petitioner alleges "innocence" of a capital sentence, *see Sawyer*, 505 U.S. 333.

Sawyer delineates the test for capital sentences. "[T]o show 'actual innocence'" in that context, "one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 336.

Sawyer's facts illustrate what is required to meet this standard. There, the Court rejected the petitioner's attempt to present defaulted claims based on new evidence that the petitioner was "actually innocent" of his sentence. *Id.* at 347-50. That evidence concerned the petitioner's "role in the offense" (including affidavits attacking a witness's credibility and providing a potentially exculpatory statement) as well as medical records about the petitioner's mental health. *Id.* at 347-48. Neither set of evidence undermined the jury's *eligibility* findings. *Id.* at 347-50. The mental-health records were irrelevant. *Id.*

at 348. They neither "relate[d] to petitioner's guilt or innocence of the crime," nor to "the aggravating factors found by the jury that made the petitioner eligible for the death penalty." *Id.* The witness-credibility affidavit fared no better; that "sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear-and-convincing showing that no reasonable juror would have believed the heart of" the witness's account. *Id.* at 349. Finally, although the potentially exculpatory statement went to the jury's finding of an aggravating factor, the Court concluded that the "affidavit, in view of all the other evidence in the record, [did] not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury." *Id.* at 349-50.

b. *Sawyer* and other cases demonstrate several key points about this actual-innocence exception.

To begin with, the exception is true to its name—it "is concerned with actual as compared to legal innocence." *Id.* at 339. In the noncapital context, "[a] prototypical example of 'actual innocence' . . . is the case where the State has convicted the wrong person of the crime." *Id.* at 340. In capital cases, similarly, actual innocence requires a showing of innocence of the crime *or* of the other requirements for eligibility (i.e., the aggravating circumstances). *Id.* at 345-47. "[A] claim of actual innocence must," therefore, "be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Petitioners must cast doubt on more than the constitutional validity of their sentence; they must present

new facts that undermine the finding of guilt or death-penalty eligibility.

In addition, an *actual-innocence claim* that overcomes a procedural default is distinct from the *constitutional claim* that entitles a petitioner to habeas relief. "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404; *see McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (calling "actual innocence" "a gateway through which a petitioner may pass" when impeded by a "procedural bar"). The exception applies "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). Thus, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 U.S. at 316.

Finally, "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 133 S. Ct. at 1928. The Court has "emphasized the narrow scope of the fundamental miscarriage of justice exception." *Sawyer*, 505 U.S. at 340. The exception will be met only in the "extraordinary case." *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks omitted).

2. The Sixth Circuit dramatically expanded the actual-innocence exception to cover legal errors that have nothing to do with actual innocence

The Sixth Circuit's decision applied the actual-innocence exception even though Hutton had *never* raised it. Pet. App. 20a; *id.* at 47a (Rogers, J., dissenting). Its decision to reach the exception *sua sponte* provides a compelling reason for review. And its application of the exception conflicts with this Court's jurisprudence in at least three ways.

a. *Eligibility v. Weighing Stage.* The Sixth Circuit erred by extending the exception from the *eligibility* stage (asking whether aggravating circumstances make Hutton eligible for the death penalty) into the *weighing* stage (asking whether those circumstances outweigh mitigating circumstances). At the guilt phase, a jury determines whether aggravating circumstances exist so as to trigger a defendant's eligibility for the death penalty. Ohio Rev. Code § 2929.03(B)-(C) (1985). The penalty phase, by comparison, concerns the weighing of the already found aggravating circumstances against any mitigating ones. *Id.* § 2929.03(D) (1985). In this case, the jury found two aggravating circumstances at the guilt (eligibility) stage. Trial Tr., R.16-29, PageID#7697-700. Thus, "Hutton's eligibility for the death penalty is indisputable." Pet. App. 48a (Rogers, J., dissenting). Yet the Sixth Circuit invoked the actual-innocence exception for an alleged *weighing-stage* error, concluding that "the failure to define 'aggravating circumstances' in the [penalty-phase] jury instructions"

resulted in a "fundamental miscarriage of justice." Pet. App. 24a-25a.

This conflicts with *Sawyer*. *Sawyer* identified "three possible ways" to define "actual innocence." 505 U.S. at 343. It rejected the "strictest" definition, which would ask whether a petitioner was innocent of "the elements" of the crime. *Id.* And it rejected the "most lenient," which would extend "actual innocence" "to mitigating evidence that bore not on the defendant's eligibility [for] the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment"—here, penalty-stage weighing. *Id.* at 344-46. Instead, the Court chose a middle ground, asking whether a petitioner was "innocent" of the aggravating circumstance that triggered death-penalty *eligibility*—here, the jury's guilt-stage finding that Hutton was guilty of two aggravating circumstances. *Id.* at 347; Trial Tr., R.16-29, PageID#7697-700. By expanding "actual innocence" to the weighing stage, the Sixth Circuit all but adopted the "lenient" definition that *Sawyer* rejected.

b. *Legal v. Factual Innocence.* The Sixth Circuit next erred by extending the actual-innocence exception to *legal*, not just *factual*, claims. Neither the panel nor Hutton identified *new evidence* suggesting that Hutton did not factually commit the acts making up the aggravating circumstances of which he was convicted—i.e., that he did not kidnap Ricky Mitchell (the felony-murder circumstance), or attempt to murder Samuel Simmons (the course-of-conduct circumstance). The panel instead found Hutton "innocent" of the death penalty because of an

alleged legal error in the penalty-phase instructions. Pet. App. 24a-25a.

The Sixth Circuit's holding that the actual-innocence exception reaches legal errors unrelated to *factual* innocence conflicts with *Sawyer*. There, the petitioner claimed that "but for the alleged violations, he could have *introduced evidence* negating a state-law element of death-penalty eligibility." *Frazier v. Jenkins*, 770 F.3d 485, 507 (6th Cir. 2014) (Sutton, J., concurring in judgment) (emphasis added) (explaining the petitioner's argument in *Sawyer*). *Sawyer* nowhere held that a legal error *alone* would suffice. The "exception is concerned with actual as compared to legal innocence." 505 U.S. at 339.

c. *Gateway v. Constitutional Claim*. The Sixth Circuit lastly erred by conflating the constitutional claim entitling Hutton to relief from his *sentence* with the actual-innocence claim entitling Hutton to relief from his *default*. The court allowed a jury-instruction claim (alleging a violation of *Ring* and *Gregg v. Georgia*, 428 U.S. 153 (1976)) to double as an actual-innocence claim. Pet. App. 24a-25a.

This conflicts with *Sawyer*, too. *Sawyer* held that the constitutional claim *itself* does not satisfy the exception. "If federal habeas review of capital sentences is to be at all rational," a "petitioner must show something more in order for a court to reach the merits." 505 U.S. at 345. Indeed, if a meritorious constitutional claim (prejudice) were enough to satisfy the miscarriage-of-justice exception, a federal court could always dispense with "cause" altogether. *See id.* at 345 n.13. Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway

through which a . . . petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.

Under the Sixth Circuit's view, by contrast, the typical cause-and-prejudice standard will always be swallowed by the "rare" actual-innocence exception. The Sixth Circuit rejected Hutton's cause-and-prejudice arguments when it affirmed the denial of his ineffective-assistance claims. Pet. App. 25a-27a; *see* Pet. App. 46a & n.2 (Rogers, J., dissenting). Yet it held that the supposed validity of his constitutional claim alone (i.e., prejudice) was enough to overcome a procedural bar. *See* Pet. App. 24a-25a.

By collapsing Hutton's constitutional and gateway claims, the Sixth Circuit's decision allows a gateway claim to overcome a default *whenever* a constitutional claim has merit. This case proves that risk. The court's holding that a violation of *Ring*—which held that a jury, not a judge, must find the aggravating circumstances—established an actual-innocence claim suggests that most constitutional violations also can double as gateway claims. After all, *Ring* does not even apply retroactively, as it did *not* adopt a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352, 358 (2004) (internal quotation marks omitted). It is difficult to see how *Ring* can be "fundamental" for the miscarriage-of-justice exception but "non-fundamental" for retroactivity purposes.

B. The Sixth Circuit's Expansion Of The Actual-Innocence Exception Conflicts With Other Circuits' Narrower Views Of It

Other courts have heeded this Court's command to "exercise restraint when determining whether to expand the exceptions to the procedural default rule." *McKay v. United States*, 657 F.3d 1190, 1198 (11th Cir. 2011). The Sixth Circuit's expansion of the actual-innocence exception conflicts with these decisions. This split occurs along the same fault lines marking the Sixth Circuit's departure from *Sawyer*.

1. *Eligibility v. Weighing Stage.* Many courts hold that the actual-innocence exception applies only at the *eligibility* stage, not the *weighing* stage, of a capital trial. The Eighth Circuit, for example, has concluded that "courts may not consider the jury's penalty-phase *balancing function*" when analyzing an actual-innocence claim. *Wooten v. Norris*, 578 F.3d 767, 781 (8th Cir. 2009) (emphasis added). *Wooten* held that mental-health evidence pertinent to the weighing stage did not show that "reasonable jurors would have found . . . elements of the crime or the aggravator missing." *Id.* at 782. As a result, the actual-innocence exception could not apply. *Id.*

The Tenth Circuit has made the same point. In *Black v. Workman*, 682 F.3d 880 (10th Cir. 2012), the petitioner claimed that he could satisfy the exception with his brother's previously un-introduced testimony about their horrendous childhood. *Id.* at 915. If the jury had considered that testimony, he argued, "it would not have found that aggravating circumstances outweighed mitigating factors and thus would not have sentenced him to death." *Id.* The

Tenth Circuit found this argument "foreclosed by *Sawyer*." *Id.* *Sawyer* refused to "broaden[] the actual-innocence inquiry beyond guilt of the crime and the presence of aggravating circumstances." *Id.* Thus, the weighing of circumstances was "not an element for purposes of the actual-innocence inquiry." *Id.* at 916.

Other circuits have read *Sawyer* in the same way—as "reject[ing] the argument that a constitutional error that impacts only the jury's *discretion* whether to *impose* a death sentence upon a defendant who is unquestionably *eligible* for it under state law can . . . excuse the failure to raise it timely in prior state and federal proceedings." *Rocha v. Thaler*, 626 F.3d 815, 823 (5th Cir. 2010). "In other words, even if the petitioner can show that but for the constitutional error the weighing of the factors might have been different, that is not enough to make a colorable showing of actual innocence." *Johnson v. Singletary*, 991 F.2d 663, 668 (11th Cir. 1993); *see Buckner v. Polk*, 453 F.3d 195, 200 n.4 (4th Cir. 2006).

The Sixth Circuit's decision cannot be squared with these cases. As the Eighth Circuit observed, "actual innocence refers only to the underlying factors of guilt and the jury's finding of death-qualifying aggravators." *Wooten*, 578 F.3d at 781. Ohio juries make those findings during the *guilt phase*, and Hutton's trial was no exception. Trial Tr., R.16-29, PageID#7697-700; Pet. App. 49a (Rogers, J., dissenting) ("As there [was] no question about the validity of the two specifications, any error in the *penalty-phase* jury instructions did not affect Hutton's eligibility for

the death penalty."). Yet the Sixth Circuit found actual innocence due to an alleged error at the penalty phase—*after* the jury had made the eligibility findings and *during* the time that it was weighing the aggravating circumstances against the mitigating ones. In these other circuits, the actual-innocence exception simply would not apply at this stage.

In his en banc opposition, Hutton responded to this point by claiming that "[t]he element at issue is" whether the "aggravating circumstance outweighs the mitigating factors." Opp., App. R.76, at 7. That argument misreads Ohio law and does not reconcile the decision below with these cases. Under Ohio's capital-sentencing system, "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment, because '[those] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *State v. Belton*, __ N.E.3d __, 2016-Ohio-1581 ¶ 60 (Ohio 2016) (citation omitted). Even if Ohio law were otherwise, it would not change the actual-innocence exception. The exception's scope is a *federal* question. As the Tenth Circuit has said, "*even if* state law considers the outweighing of mitigating circumstances by aggravating circumstances [to be] an 'element' of a capital sentence, it is not an element for purposes of the actual-innocence inquiry." *Workman*, 682 F.3d at 916 (emphasis added).

2. *Legal v. Factual Innocence.* Circuit courts have also routinely rejected actual-innocence arguments when the "arguments [went] to legal innocence, as opposed to factual innocence." *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000); *Shore v.*

Davis, 845 F.3d 627, 633 n.4 (5th Cir. 2017) (declining to apply miscarriage-of-justice exception where petitioner had not "show[n] that he has a colorable claim of factual innocence"); *Pitts v. Norris*, 85 F.3d 348, 350-51 (8th Cir. 1996) (same); *see also Buie v. McAdory*, 341 F.3d 623, 626 (7th Cir. 2003). These decisions recognize that "the 'actual innocence' rationale remains firmly rooted in the testing of allegedly erroneous factual determinations." *Cristin v. Brennan*, 281 F.3d 404, 422 (3d Cir. 2002). That rationale is simply inapplicable when a petitioner relies solely on legal arguments.

The Sixth Circuit's decision ignored this principle. It found Hutton to be "actually innocent" simply because of an alleged error in the penalty-phase instructions, Pet. App. 24a-25a, not because of a claim that he did not kidnap or shoot his victims (so as to disprove the aggravating circumstances). Whether the trial court delivered adequate jury instructions has nothing to do with whether Hutton killed Mitchell while attempting to kill Simmons (the "course-of-conduct" circumstance) or kidnapped Mitchell before killing him (the "felony-murder" circumstance). The decision below thus conflicts with cases holding that an actual-innocence claim "'require[s] a showing that one of the statutory aggravators or other requirements for the imposition of the death penalty had not been met.'" *Jones v. Ryan*, 733 F.3d 825, 845 (9th Cir. 2013) (citation omitted). It relied on *no* new evidence to show that Hutton did not commit the two aggravating circumstances.

3. *Gateway v. Constitutional Claim.* Lastly, several circuits have highlighted the distinction between

the actual-innocence "gateway" (that allows a petitioner to overcomes a default) and the underlying constitutional claim (that secures habeas relief). *E.g.*, *Case v. Hatch*, 731 F.3d 1015, 1036-37 (10th Cir. 2013); *Rocha*, 626 F.3d at 824-25; *Sibley v. Culliver*, 377 F.3d 1196, 1207 n.9 (11th Cir. 2004); *Embrey v. Hershberger*, 131 F.3d 739, 741 (8th Cir. 1997); *Turner v. Jabe*, 58 F.3d 924, 932 (4th Cir. 1995). "[C]onsideration of a petitioner's gateway claim of innocence precedes consideration of his federal constitutional claim not just temporally but analytically." *Rocha*, 626 F.3d at 824. Without this distinction, the logic of an actual-innocence claim becomes "circular"; if a petitioner can "recharacterize[] his legal claim that he was wrongly convicted and sentenced as an assertion that he is 'actually innocent,' in an attempt to resuscitate the claim that he was wrongly convicted and sentenced," "then every sentence would be subject to an endless number of successive reviews." *Embrey*, 131 F.3d at 741.

Take the Eleventh Circuit's *Embrey* decision, a non-capital case. There, the petitioner claimed that he was legally ineligible for the sentence that he had received. *Id.* at 739-40. He attempted to overcome a procedural default by contending that this same fact made him "actually innocent" of that sentence. *Id.* at 740. Although the Eleventh Circuit thought *Sawyer* was inapplicable in the non-capital context, it added that the petitioner's legal argument did not show his "actual innocence." *Id.* at 740-41. It explained that "[a] legal claim" could, "by resort to a rather unsophisticated play on words, always be converted into a complaint that the relevant facts did not support a

conviction and that therefore the defendant was 'actually innocent.'" *Id.* at 741.

The approach rejected by *Embrey* is analogous to the one that the Sixth Circuit adopted. Although Hutton never argued that his jury-instruction claim made him "actually innocent," he did argue that it entitled him to relief. Pet. App. 14a. The Sixth Circuit used that same claim to excuse Hutton's default. *Compare* Pet. App. 25a (finding a "fundamental miscarriage of justice" because "the jury, without proper instructions, could not have made a finding that aggravating circumstances existed"), *with id.* (granting relief because "*Apprendi*, *Ring*, and *Gregg* establish that Hutton's constitutional rights were violated").

In sum, the Sixth Circuit dramatically expanded the actual-innocence exception in a way that conflicts with this Court's cases and with cases from other circuits. That extension warrants this Court's review.

II. The Decision Below Conflicts With Cases From This Court And From Other Circuits Over Whether The Sixth Amendment Applies At A Capital Trial's Weighing Stage

In addition to its *sua sponte* expansion of the actual-innocence exception, the Sixth Circuit equally erred by expanding the Sixth Amendment's jury-trial guarantees into the weighing stage of a capital trial (where it is determined whether the aggravating circumstances outweigh the mitigating ones). This conclusion warrants review because it, too, conflicts with this Court's cases and with cases from other courts.

A. The Sixth Circuit's Decision Conflicts With This Court's Cases

This Court's capital-sentencing cases draw a line between errors concerning a defendant's death-penalty *eligibility*, which may not be cured by judicial reweighing, *see Hurst*, 536 U.S. at 609, and errors concerning the *weighing* of aggravating and mitigating circumstances, which may be cured by judicial reweighing, *see Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990). The Sixth Circuit's decision upends this distinction, and calls this Court's *Clemons* decision into doubt.

1. This Court's Sixth Amendment cases distinguish between the weighing and eligibility stages of a capital trial

The Sixth Amendment gives defendants "the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. Const. amend. VI. "[T]he fundamental meaning" of this guarantee "is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). So "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Ring and *Hurst* explained how these principles applied to the capital-sentencing regimes of Arizona and Florida, respectively. *Ring*, which partially overruled *Walton v. Arizona*, 497 U.S. 639 (1990), found that "[c]apital defendants, no less than non-

capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. In Arizona, moreover, a defendant becomes eligible for the death penalty *only* if an aggravating factor is found. *Id.* at 597. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court held, "the Sixth Amendment requires that they be found by a jury," rather than a judge, beyond a reasonable doubt. *Id.* at 609 (citation omitted).

Hurst applied *Ring*'s holding to Florida's similar sentencing system. 136 S. Ct. at 621-24. Florida juries made only *recommendations* concerning the aggravating factors and the ultimate decision on whether to impose a death sentence (recommendations that trial courts were *not* obligated to follow). *Id.* at 620. A death sentence thus could be imposed if a trial court independently found that an aggravating circumstance was present and that the circumstance outweighed any mitigating ones. *Id.* at 622. *Hurst* ruled that a jury's advisory recommendations with respect to aggravating circumstances did not satisfy the Sixth Amendment. *Id.*

Critically, a footnote in *Ring* clarified the narrow nature of its ruling (which illustrates the narrow scope of *Hurst* as well). 536 U.S. at 597 n.4. *Ring* addressed only the aggravating-circumstance finding that makes a defendant death-penalty *eligible*. The case did *not* consider "mitigating circumstances"; it did not address whether "the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty"; and it did "not

question [a state court's] authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." *Id.*

These disclaimers reconciled *Ring* (and *Hurst*) with the Court's other cases, including *Clemons*. In *Clemons*, the Court held that "a death sentence that is based in part on an invalid or improperly defined aggravating circumstance" may be cured by "a state appellate court." 494 U.S. at 741. The Mississippi Supreme Court had affirmed a death sentence that was based on two aggravating factors, one of which was "constitutionally invalid." *Id.* This Court held that state appellate courts may uphold such a sentence by "careful appellate weighing of" the valid aggravating factors and mitigating circumstances. *Id.* at 748-50. Thus, while *Clemons* contained broader dicta that did not survive *Ring*—e.g., suggesting that "the Sixth Amendment does not require that a jury specify the aggravating factors," *id.* at 746—its central holding permitting appellate reweighing when the jury has found at least one valid aggravating factor did survive. *See Ring*, 536 U.S. at 597 n.4.

Read together, *Ring* and *Clemons* show that the jury must factually find the aggravating circumstance that makes a defendant *eligible* for the death penalty, but need not undertake the *weighing* of aggravating and mitigating circumstances to determine whether the death penalty is the proper punishment. This makes sense. "[T]he aggravating-factor determination (the so-called 'eligibility phase')" "is a purely factual determination," one that implicates the jury-trial right. *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). "[T]he ultimate question whether mitigating

circumstances outweigh aggravating circumstances," by contrast, "is mostly a question of mercy" rather than of fact. *Id.*; *cf. Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality op.).

After *Ring*, therefore, this Court has held that state law may authorize a death sentence when the jury finds that the aggravating and mitigating circumstances are in *equipoise*. *See Kansas v. Marsh*, 548 U.S. 163, 165-66 (2006). To reach that result, *Marsh* relied on a non-overruled portion of *Walton*, which held that a "state death penalty statute may place the burden *on the defendant* to prove that mitigating circumstances outweigh aggravating circumstances." *Marsh*, 543 U.S. at 173 (emphasis added). Yet if the balancing of aggravating and mitigating circumstances qualified as a "fact-finding" with respect to an "element" within the meaning of the Sixth Amendment, that amendment would require a beyond-a-reasonable-doubt standard for this weighing process. *See Apprendi*, 530 U.S. at 490.

In sum, this Court's cases distinguish between *eligibility* errors that involve a lack of fact-finding by the jury (where the Sixth Amendment restricts appellate reweighing) and *weighing* errors that involve the jury's moral judgment about whether to impose the death penalty (where the Eighth Amendment permits appellate reweighing). When a jury has found beyond a reasonable doubt at least one valid aggravating circumstance, as was the case in *Clemons*, the defendant's eligibility for the death penalty satisfies the Sixth Amendment and an appellate court may affirm a sentence even if other aggravating factors relied on by the jury were "invalid or

improperly defined." *See Clemons*, 494 U.S. at 741; *see also id.* at 748. Where, however, a jury has found *no* aggravating factors, *Ring* precludes appellate reweighing. 536 U.S. at 596, 609.

2. The Sixth Circuit's decision muddies the clear distinction between the eligibility and weighing stages

The Sixth Circuit's decision erases the line between *Clemons* (where appellate reweighing is allowed) and *Ring* (where it is not). Here, at the guilt phase of Hutton's trial, the jury found beyond a reasonable doubt that two aggravating circumstances made him death-penalty eligible. Trial Tr., R.16-29, PageID#7697-700. Thus, "Hutton's eligibility for the death penalty is indisputable." Pet. App. 48a (Rogers, J., dissenting). The alleged constitutional error instead occurred at the penalty (or weighing) phase, after the jury had determined Hutton's eligibility. Because the penalty-phase instructions (allegedly) did not adequately explain that the aggravating circumstances were limited to those that the jury had found at the guilt phase, the Sixth Circuit decided that the jury's weighing process could have included invalid aggravators. Pet. App. 24a. And even though the appellate courts reweighed the valid aggravating factors against the mitigating ones, the Sixth Circuit added that *Ring* and *Hurst* barred this reweighing to fix the alleged error. Pet. App. 22a-23a. This analysis conflicts with this Court's cases.

To begin with, *Ring* limits only judicial *fact-finding*—not the *moral judgment* involved in determining whether aggravating factors outweigh mitigating ones. *Carr*, 136 S. Ct. at 642; *cf. Ring*, 536

U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed."). The petitioner's "tightly delineated" claim in *Ring* was *not* "that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty." 536 U.S. at 597 n.4. And *Ring* did "not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." *Id.* (citing *Clemons*). Whereas the jury in *Ring* found *no* aggravating circumstances that made the defendant death-penalty eligible, *id.* at 592-96, the jury in this case *indisputably* found two, Pet. App. 245a, 259a-260a. "That distinction makes all the difference for Sixth Amendment purposes." Pet. App. 52a (Rogers, J., dissenting).

Nor could the Sixth Circuit distinguish *Clemons*. Pet. App. 23a-24a. In *Clemons*, the court reasoned, the jury considered at least *one* valid aggravating factor in its weighing. Pet. App. 24a. Here, the Sixth Circuit appears to have reasoned that the jury might not have found *any* valid aggravating factors at the penalty phase, *id.*, even though the jury found two aggravating circumstances at the guilt phase, Trial Tr., R.16-29, PageID#7697-700. But it is sheer speculation to suggest that the jury's weighing in *Clemons* placed greater significance on the valid (as opposed to the invalid) aggravating factor. Instead, the decision's main holding rested on its conclusion that a defendant has no right to have a jury make the *ultimate* sentencing decision, *Clemons*, 494 U.S.

at 746, and that an appellate court could adequately reweigh the valid aggravating and mitigating circumstances to make that decision, *id.* at 748-52. This logic just as much applies here as it did there.

The decision below also effectively follows an earlier prediction of one panel member—that "it seems very likely that *Ring* has overruled *Clemons*." *Baston v. Bagley*, 420 F.3d 632, 639 n.1 (6th Cir. 2005) (Merritt, J., dissenting). Indeed, the concurrence below read *Hurst* as extending the Sixth Amendment into the weighing stage by holding that a *jury* must find that the "aggravators outweigh the mitigators." Pet. App. 39a n.1 (Merritt, J., concurring). This view that *Ring* (and *Hurst*) overruled *Clemons* (and *Marsh*) likewise conflicts with this Court's cases. "'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). *Ring* and *Clemons* are easily reconcilable. But, even if they were not, the Sixth Circuit should have followed the case that was directly on point at the weighing stage (*Clemons*); it should not have extended other cases (*Ring* and *Hurst*) into a new orbit that they have yet to reach.

B. The Sixth Circuit's Decision Conflicts With Cases That Reject Attempts To Extend *Ring* Into The Weighing Stage

The Sixth Circuit's decision also conflicts with appellate decisions that have rejected claims that *Ring*'s principles apply at the weighing stage.

Before *Hurst*, for example, circuit courts had repeatedly rejected challenges to the federal death-penalty regime, a regime that would conflict with the Sixth Amendment if the amendment applied at the weighing stage. Federal law does *not* require a jury to use the beyond-a-reasonable-doubt standard when deciding whether the aggravating circumstances outweigh the mitigating ones. 18 U.S.C. § 3593(e). Instead, a jury need only "consider whether all the aggravating . . . factors found to exist *sufficiently outweigh* all the mitigating . . . factors found to exist to justify a sentence of death." *Id.* (emphasis added); *cf. Apprendi*, 530 U.S. at 490.

The circuit courts that upheld this regime *before Hurst* (including the Sixth Circuit) concluded that *Ring categorically* did not apply at the weighing stage. "Since the Constitution does not require a jury to do the weighing, we cannot conclude that the showing required must be proof beyond a reasonable doubt." *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007) (relying on *Clemons* and *Proffitt*); *see also United States v. Gabrion*, 719 F.3d 511, 531-33 (6th Cir. 2013) (en banc); *United States v. Runyon*, 707 F.3d 475, 515-16 (4th Cir. 2013); *United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir. 2007). These courts recognized that "the requi-

site weighing constitutes a process, not a fact to be found." *Sampson*, 486 F.3d at 32. It is, in other words, a "complex moral judgment." *Runyon*, 707 F.3d at 516.

In addition, under some state laws the jury does *not* make the ultimate finding that the aggravating circumstances outweigh the mitigating ones. In Alabama, a trial court may overrule a jury's life-imprisonment recommendation (so long as the jury has found that an aggravating circumstance existed so as to make the defendant death-penalty eligible). *See Ex parte Waldrop*, 859 So. 2d 1181, 1188-90 (Ala. 2002); *Lee v. Comm'r, Ala. Dep't of Corrs.*, 726 F.3d 1172, 1197-98 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."). The Alabama Supreme Court has since ruled that *Hurst* does not affect the weighing stage or require it to change course. *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5-6 (Ala. Sept. 30, 2016), *cert. denied*, No. 16-6746, 2017 WL 276218 (U.S. Jan. 23, 2017).

The Sixth Circuit's decision below that *Ring*—at least after *Hurst*—applies at the weighing stage of a capital trial cannot be reconciled with these cases. Pet. App. 22a-25a. Again, the jury here indisputably found two aggravating circumstances beyond a reasonable doubt at the guilt phase. Trial Tr., R.16-29, PageID#7697-700. That the trial court allegedly "gave the jury no guidance as to what to consider as aggravating circumstances" when weighing those circumstances against the mitigating ones, Pet. App. 24a, would not raise any Sixth Amendment concern

under these other cases. Indeed, *Bohannon*'s logic suggests that Hutton did not have a right to a jury trial *at all* at the weighing stage—even after *Hurst*.

* * *

The Sixth Circuit's resolution of each of these issues warrants this Court's attention. It also bears noting that the court had no need to engage in its significant expansions of the actual-innocence exception or *Ring* because the penalty-phase jury instructions likely did not even raise a constitutional problem. The test for alleged instructional errors asks "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citation omitted). Here, the instructions conveyed that Ohio had to prove "that the aggravating circumstances, *of which the Defendant was found guilty*, outweigh the factors in mitigation." Trial Tr., R.16-29, PageID#7767 (emphasis added). And the prosecutor identified the aggravating circumstances that were found at the guilt phase as the ones that were at issue at the penalty phase. *Id.*, R.16-24, PageID#6119-21; *id.*, R.16-29, PageID#7729-31. It is speculative to suggest that the jury did not understand that its penalty-phase weighing should consider only those circumstances. At the least, the prosecutor, defense counsel, and trial judge were better positioned in 1986 to know whether the jury understood the aggravating circumstances than a federal court reviewing a cold record 30 years later.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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SUPREME COURT U.S.

No. 16-___

In the Supreme Court of the United States

CHARLOTTE JENKINS, Warden,

Petitioner,

v.

PERCY HUTTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 13-3968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PERCY HUTTON,

Petitioner-Appellant,

v.

BETTY MITCHELL, WARDEN,

Respondent-Appellee.

ORDER

Filed: December 13, 2016

BEFORE: MERRITT, ROGERS, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

---

* Judge Cook recused herself from participation in this ruling.

APPENDIX B

839 F.3d 486
United States Court of Appeals,
Sixth Circuit.

Percy Hutton, Petitioner–Appellant,
v.
Betty Mitchell, Warden, Respondent–Appellee.

No. 13-3968
|
Argued: March 16, 2016
|
Decided and Filed: October 12, 2016
|
Rehearing En Banc Denied December 13, 2016*

***490** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:05–cv–02391—Christopher A. Boyko, District Judge.

Attorneys and Law Firms

ARGUED: Michael J. Benza, Chagrin Falls, Ohio, for Appellant. ***491** Katherine E. Mullin, OFFICE OF THE OHIO ATTORNEY GENERAL, Cleveland, Ohio, for Appellee. ON BRIEF: Michael J. Benza, Chagrin Falls, Ohio, Alan C. Rossman, Jillian S. Davis, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant.

---

* Judge Cook recused herself from participation in this ruling.

Katherine E. Mullin, Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Cleveland, Ohio, for Appellee.

BEFORE: MERRITT, ROGERS, and DONALD, Circuit Judges.

DONALD, J., delivered the opinion of the court in which MERRITT, J., joined, and ROGERS, J., joined in part. MERRITT, J. (pp. 505–09), delivered a separate concurring opinion. ROGERS, J. (pp. 505–13), delivered a separate opinion dissenting in part.

OPINION

BERNICE BOUIE DONALD, Circuit Judge.

Percy Hutton, an Ohio death row inmate, appeals the United States District Court for the Northern District of Ohio's denial of his 28 U.S.C. § 2254 habeas petition. Hutton was convicted and sentenced to death for murdering Derek "Ricky" Mitchell and attempting to kill Samuel Simmons, Jr. on September 16, 1985.

In his habeas petition, Hutton asserted thirteen grounds for relief. Of the thirteen claims, six were certified for appeal. One claim gives this Court the most pause, as it requires us to revisit *Hoffner v. Bradshaw*, 622 F.3d 487 (6th Cir. 2010), and again question whether a state court's independent review of a death sentence during sentencing can cure *any* omission in a jury instruction. For the reasons that follow, we **REVERSE** the district court's decision in part, **CONDITIONALLY GRANT** Hutton's habeas petition, and **REMAND** this case to the district court

with instructions to order Hutton's release from custody unless the state grants a new sentencing hearing within 180 days from the date that this Court issues the mandate.

I.

A. Factual Background

In the last state adjudication of Hutton's habeas petition claims, the Ohio Supreme Court made the following findings of fact as to what likely unfolded on the days the crimes for which Hutton was convicted were committed:

> {¶ 1} In 1986, a jury found that Appellant, Percy "June" Hutton, murdered Derek "Ricky" Mitchell and attempted to kill Samuel Simmons Jr. on September 16, 1985. Hutton was convicted of aggravated murder with two death specifications. After a penalty hearing, the trial court sentenced Hutton to death.
>
> {¶ 2} Hutton had once been a close friend of Mitchell and Simmons. However, Hutton became angry with the two men because he believed that they had stolen from him. On Friday, September 13, or Saturday, September 14, 1985, outside the house where Samuel Simmons Jr., then lived, Hutton confronted Simmons over the theft of a sewing machine belonging to Hutton.
>
> {¶ 3} Claiming that he had seen Mitchell trying to sell the machine, Hutton demanded its immediate return. Simmons suggested that Hutton talk to Mitchell. During this conversation, Mitchell arrived. He and Hutton

entered the residence and went upstairs together. When they returned, according to Simmons, Hutton said that "it wasn't what he was looking for and if he found out we had anything to do with what was missing or stolen he was going to kill us." Hutton also told Mitchell, "I'm ***492** tired with you f* * *ing with me and stuff like that."

{¶ 4} Around midnight on Monday, September 16, 1985, Hutton drove to Simmons's house in a gray Chrysler Cordoba, accompanied by Bruce Laster, whose sister was engaged to Hutton. Hutton asked Simmons to come with him and help him work on a car. When Simmons got into Hutton's car, he noticed a .22–caliber rifle lying on the back seat.

{¶ 5} Hutton drove to Mitchell's house, stating that he wanted to talk to Simmons and Mitchell. When they arrived, Simmons went in and brought Mitchell outside, telling him that "June wanted to talk to him." Hutton then confronted Mitchell, demanding the return of his sewing machine and accusing Mitchell of stealing some tires from Hutton's backyard. Hutton said that he had hidden $750 in the sewing machine.

{¶ 6} Mitchell denied taking the machine. However, Hutton insisted that Mitchell had tried to sell it to a Mr. Evans. Hutton demanded that Mitchell come with him to Evans's house to settle the issue. Hutton threatened to "f* * * [Mitchell] up" if Evans confirmed Mitchell's guilt.

{¶ 7} Mitchell and Simmons got into the car. Before pulling away from the curb, Hutton pointed the rifle into Simmons's side and said: "I don't appreciate you all breaking in my sister's house."

{¶ 8} Instead of going to Evans's house, Hutton drove to a parking lot behind an RTA bus facility. Hutton got out of the car and ordered Mitchell to get out as well. Hutton and Mitchell then walked a short distance from the car. Simmons could not hear their conversation, but he saw Hutton put a pistol against Mitchell's head.

{¶ 9} Hutton and Mitchell returned to the car. With Mitchell giving directions, Hutton drove to an area known as "the Projects." Hutton and Mitchell went into a building and emerged after a few minutes with a white sewing-machine case.

{¶ 10} Hutton drove to his mother's house, took the case inside, and returned to the car. He then drove to the next street and pulled into an alley where a Cadillac El Dorado was parked. Hutton told Simmons that the El Dorado was the car he wanted to work on. Simmons got out of Hutton's car. Hutton then moved his car to the other end of the street. Leaving Laster and Mitchell in the car, he walked back to the alley, where Simmons was waiting.

{¶ 11} Hutton broke into the El Dorado with a screwdriver. When Simmons got inside, Hutton opened the hood and told him to try

starting the engine. Hutton then walked back to Simmons, shot him twice in the back of the head, and ran up the alley.

{¶ 12} Unable to move at first, lying half in and half out of the car, Simmons cried for help. He managed to get up and stagger away in search of assistance. Simmons went first to the nearby home of Hutton's mother, then to Mary Etta Pollard's house next door. He banged on Pollard's front door and cried for help. Then he heard Hutton's car coming out of the nearby alley. He ran into Pollard's back yard and pounded on the back door, shouting that he had been shot.

{¶ 13} Hutton drove up and stopped in front of Pollard's house. He urged Simmons to "come here" or "come from back there." Hutton noticed that Pollard's son[, Allen Pollard,] was looking out from his front door and told him to close the door. Simmons begged Hutton to take him to the hospital. Hutton said, ***493** "Just shut up and get in the car," and Simmons obeyed. Mitchell and Bruce Laster were in the car with Hutton.

{¶ 14} Telling Mitchell that some unknown assailant had shot Simmons, Hutton drove to St. Luke's Hospital. Simmons asked Mitchell to go inside with him, but Mitchell said, "No. We [are] going to get the mother-f* * *er that did this to you."

{¶ 15} At 2:30 a.m., Mitchell, Hutton, and Laster returned to Mitchell's home. They woke Mitchell's girlfriend, Eileen Sweeney,

and took her to the hospital, where they dropped her off. Sweeney went into the hospital to visit Simmons. Telling her that Hutton had shot him, Simmons sent her to warn Mitchell to get out of the car. She went outside, but the car was gone.

{¶ 16} Hospital security officer Paul Whitcomb saw a Chrysler Cordoba drop Simmons off and leave "in a hurry." About half an hour later, Whitcomb saw the same car drop off Sweeney. After Sweeney went inside, Whitcomb saw the same car parked across the street from the hospital. He sent security officer Gary Barnhard to get the license number. As Barnhard drove past the car, he saw its two occupants crouch down in an attempt at concealment. Then the car left. A subsequent check of the license number disclosed that the gray Chrysler was registered to Hutton's fiancée, Celeste Laster.

{¶ 17} Hutton and Bruce Laster later returned to the hospital without Mitchell. Sweeney was still there. Hutton told her that Mitchell was at home and offered to drive her back. However, once he had Sweeney inside the car, Hutton took her to a park instead. There, Hutton and Sweeney got out of the car. Laster then drove off, and Hutton proceeded to rape Sweeney. During the rape, Hutton told Sweeney that "Ricky wasn't coming back." According to Sweeney, Hutton had in his possession a small handgun with a white handle and a silver-colored barrel.

{¶ 18} When Laster returned with the car, Sweeney saw Hutton remove two rifles from the trunk and put them in the rear passenger compartment. Hutton then drove Sweeney home to the apartment she shared with Mitchell.

{¶ 19} When they arrived, Mitchell was not there. The door to the apartment had been damaged and the apartment was in disarray. Sweeney was too "scared and nervous" to drive, so Hutton drove her to the home of LaWanda Mitchell, the sister of Ricky Mitchell. Hutton followed Sweeney into LaWanda's house. According to Sweeney, Hutton told her that "Ricky [Mitchell] wasn't coming back," and that "if [she] told, someone would be looking for [her]."

{¶ 20} On Tuesday, September 17, Hutton drove to Indianapolis to enroll in a course for automotive mechanics at the Lincoln Technical Institute.

{¶ 21} On September 30, 1985, the body of Derek Mitchell was found near an intersection in Cleveland with a large tire lying on the body. An autopsy disclosed that Mitchell had been shot to death. Two .22–caliber long rifle bullets were recovered from the body; a firearms expert testified that these could have been fired from either a rifle or a handgun. The expert testified that the bullets that killed Mitchell had the same class characteristics as a bullet that had been removed from Simmons's head, but he could not tell whether

all three had been fired from the same gun. The murder weapon was never found.

{¶ 22} The defense presented evidence that Mitchell was not killed on *494 September 16, 1985, but at some later time while Hutton was in Indianapolis. Denise Richardson testified that she spoke to Mitchell at 3:00 p.m. on September 17, 1985, the day after the state claims Mitchell was murdered. According to Hutton, he was in Indianapolis at the time Richardson spoke to Mitchell. Hutton claimed that he stayed in Indianapolis until October 3, except for two brief visits to Cleveland on September 21 and 28. An employee of the Indianapolis YMCA saw Hutton there sometime after 4:00 p.m. on September 17. The YMCA employee testified that Hutton had paid rent for the period of September 17 through October 3.

{¶ 23} On October 4, 1985, Cleveland Police Detective Robert Moore spoke to Hutton on the telephone. Hutton agreed to return to Cleveland and surrender to Moore at a prearranged time and place. On October 5, Hutton surrendered.

{¶ 24} Hutton and Laster were jointly indicted on two counts of aggravated murder for killing Derek Mitchell. The first count charged that they committed the murder with prior calculation and design. [O].R.C. 2903.01(A). The second charged them with murdering Mitchell while committing, attempting, or fleeing the commission or attempted

> commission of kidnapping. [O].R.C. 2903.01(B). Each murder count carried two capital specifications: a course-of-conduct specification, [O].R.C. 2929.04(A)(5), and a felony-murder kidnapping specification, [O].R.C. 2929.04(A)(7). Hutton and Laster were also indicted for kidnapping Mitchell and Simmons, and for the attempted murder of Simmons. Each count carried a firearm specification.

State v. Hutton, 100 Ohio St.3d 176, 797 N.E.2d 948, 952–55 (2003).

B. Procedural History

In 1986, an Ohio state jury convicted Hutton of aggravated murder (prior calculation and design), aggravated murder (felony-murder), two counts of kidnapping, and attempted murder, with a firearm specification attached to each count. Following the jury's recommendation, the trial court sentenced Hutton to death.

On direct appeal, the Court of Appeals for Cuyahoga County found several trial errors and set aside Hutton's convictions and sentence, but the Ohio Supreme Court reversed and remanded the case to the Ohio Court of Appeals to conduct an independent review of the appropriateness of the death sentence. *State v. Hutton*, No. 51704, 1988 WL 39276, at *31 (Ohio Ct. App. Apr. 28, 1988), *rev'd*, 53 Ohio St.3d 36, 559 N.E.2d 432, 447–48 (1990). On remand, the Court of Appeals determined that the death sentence was appropriate. *State v. Hutton*, 72 Ohio App.3d 348, 594 N.E.2d 692, 695 (1991). Hutton did not appeal that decision.

In September 1996, Hutton filed a petition for post-conviction relief in state trial court, but the court denied him relief without an evidentiary hearing. The Ohio Court of Appeals affirmed. *State v. Hutton*, No. 76348, 2004 WL 1575248, at *3 (Ohio Ct. App. July 15, 2004). The Ohio Supreme Court declined further review. *State v. Hutton*, 104 Ohio St.3d 1426, 819 N.E.2d 709 (2004) (table).

In October 2000, Hutton's motion for delayed appeal was granted. *State v. Hutton*, 90 Ohio St.3d 1441, 736 N.E.2d 903, 903 (2000) (table). In February 2001, Hutton unsuccessfully filed a second petition for post-conviction relief. *State v. Hutton*, No. 80763, 2007 WL 2955663, at *3 (Ohio Ct. App. Oct. 11, 2007). The Ohio Supreme Court again declined further review. *State v. Hutton*, 117 Ohio St.3d 1439, 883 N.E.2d 457, 457 (2008) (table). Pursuant to ***495** Ohio Rule of Appellate Procedure 26(B), Hutton applied to reopen his direct appeal, contending ineffective assistance of appellate counsel, but the Ohio Court of Appeals denied the application. *State v. Hutton*, No. 51704, 2000 WL 301097, at *2 (Ohio Ct. App. Mar. 20, 2000), *aff'd*, 100 Ohio St.3d 176, 797 N.E.2d 948, 964 (2003).

C. Federal Habeas Procedural Facts

In December 2005, Hutton filed a petition for a writ of habeas corpus in federal district court. In June 2011, Hutton amended his petition, asserting thirteen grounds for relief. Without conducting an evidentiary hearing, the district court denied habeas corpus relief but certified four of the thirteen claims for appellate review. (R. 67.) This Court expanded the certification to include two additional claims.

Accordingly, we address each of Hutton's claims in turn.

II.

We review de novo a district court's denial of a habeas petition, particularly the determinations involving matters of law or mixed questions of law and fact, and we review for clear error the factual determinations. *Gumm v. Mitchell*, 775 F.3d 345, 359–60 (6th Cir. 2014). Hutton filed his habeas petition in 2005; thus, it is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became effective on April 24, 1996. *See Keeling v. Warden*, 673 F.3d 452, 458 (6th Cir. 2012).

Under AEDPA, a writ may not be granted unless the state court's adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2). A federal habeas court may grant the writ under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts." *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014) (citing *Brown v. Payton*,

544 U.S. 133, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005)). The habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. *Id.* (citing 28 U.S.C. § 2254(e)(1)).

A.

First, we turn to Hutton's claim that the trial court failed to instruct the jury on the list of "aggravating circumstances." The Ohio statutory sentencing scheme for the death penalty requires more than a finding of guilt; it also requires the jury to make a finding of aggravating circumstances. The jury must then conclude that the aggravating circumstances outweigh the mitigating circumstances to impose the death penalty. O.R.C. § 2929.04(A).

In Hutton's case, while the jury instructions listed the seven *mitigating* circumstances, they neglected to define or list the "aggravating circumstances."[1]

---

[1] The full text of the jury instructions is as follows:

> The COURT: Ladies and gentlemen, you have now heard all the evidence and the arguments of counsel, and you will now decide whether you will recommend to the Court that the sentence of death shall be imposed upon the Defendant, and if not whether you will recommend that the Defendant be sentenced to life imprisonment with a parole eligibility after serving 20 full years of imprisonment, or to life imprisonment with parole eligibility after serving 30 full years of imprisonment.
>
> You will consider all the evidence, arguments, statements of the Defendant, pre-sentence investigation, mental examination report, and all other

information and reports which are relevant to the nature and circumstances of any mitigating factors, including but not limited to the nature and background of the Defendant, and all of the following:

1. Whether the victim of the offense induced or facilitated.

2. Whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation.

3. Whether at the time of the committing of the offense the Defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirement of the law.

4. The youth of the Defendant.

5. The Defendant's lack of significant history of prior criminal convictions and delinquency adjudications.

6. If the Defendant was a participant in the offense, but not the principal offender, the degree of the Defendant's participation in the offense and the degree of the Defendant's participation in the acts that led to the death of the victim.

7. Any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

The prosecution has the burden to prove beyond a reasonable doubt that the aggravating circumstances, of which the Defendant was found guilty, outweigh the factors in mitigation of imposing the death sentence.

To outweigh means to weigh more than, to be more important than.

The existence of mitigating factors does not preclude or prevent the death sentence. If the aggravating circumstances outweigh the mitigating factors.

Thus, there was no indication in the jury instructions ***496** which aggravating circumstances the jury could review to make a recommendation. (Pet.'s Br. 46.) However, Hutton's trial counsel never objected to the instruction, failing to preserve the claim on appeal.

In fact, the error was first discovered on review by the Ohio Supreme Court, during which the majority acknowledged the error in a footnote and Judge Brown based his partial dissent on the error.[2]

> You are, of course, mindful of the definition given you earlier by the Court of the phrase reasonable doubt, and I will share that with you again. Reasonable doubt is present when after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charges.
>
> Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral judgment is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.
>
> You should recommend the sentence of death if you unanimously, that is all twelve of you, find proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you should unanimously recommend either life sentence with parole eligibility after serving 20 years of imprisonment or life sentence with parole eligibility after serving 30 years of imprisonment.

[2] "[B]ecause the sentencing phase of the trial was marred by a plain error in the jury instructions, I must respectfully dissent from the remand for review of the death sentence." *State v.*

Hutton, 559 N.E.2d 432, 449 n.1 (1990) ("We observe that the trial court did not instruct the jury in the penalty phase as to what the aggravating circumstances were."). The Ohio Supreme Court determined that Hutton had waived the claim since Hutton failed to address it in his briefs.

***497** Asserting *Gregg v. Georgia*, Hutton claims that the trial court violated his due process rights in causing the jury to have "untrammeled discretion" to sentence him. 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (finding that a defendant's Eighth Amendment rights are violated where the jury is left with "untrammeled discretion" to impose the death penalty). The district court likewise found that the claim had been procedurally defaulted because of Hutton's failure to raise it on appeal. (R. 67, PageID 1704.) In the alternative, the district court found that the claim was meritless because the Ohio Court of Appeals cured any possible error through its independent reweighing. (*Id.* at 1704–06.) In making this decision, the district court largely relied upon our decision in *Hoffner*. (*Id.*) In *Hoffner*, however, we relied on the Ohio Supreme Court's adjudication of *this* case. 622 F.3d at 506 (applying the reasoning in *State v. Hution*, 797 N.E.2d at 958–59 (2003), to the petitioner's claim). If we were to rely solely on the ruling in *Hoffner*, we would be applying a circular analysis—i.e., we would be finding that any state trial court error in Hutton's case was cured because the Ohio Supreme Court

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Hutton, 53 Ohio St.3d 36, 559 N.E.2d 432, 449 (1990) (Brown, J., dissenting in part.).

found that the error was cured. This would abdicate our role as judges to independently review the case before us.

As to the procedural default issue, the Supreme Court has made it explicitly clear that when a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice . . ., *or* demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (emphasis added).

In determining whether a federal claim has been procedurally defaulted, we apply the test initially laid out in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). We first consider whether there is an applicable state procedural rule with which the petitioner failed to comply. *Id.* Second, we decide whether the state courts actually enforced the state procedural sanction. *Id.* Third, we determine whether the state procedural rule is an "adequate and independent" state ground on which the state can foreclose review of a federal constitutional claim. *Id.* Fourth, the petitioner must demonstrate that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*

It is clear that Hutton defaulted this claim. In Ohio, when a party fails to contemporaneously object to an error, the error is deemed waived. Ohio R. Crim. P. 52. Pursuant to Ohio's contemporaneous

objection rule, Ohio courts treat the failure to object as a procedural default. *Scott v. Mitchell*, 209 F.3d 854, 866 (6th Cir. 2000). The United States Supreme Court has specifically found that a default imposed for failure to object contemporaneously is an adequate and independent state ground barring federal habeas review absent a showing of cause and prejudice. *Id.* at 867 (citing *Engle v. Isaac*, 456 U.S. 107, 124–29, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)). Consequently, because Hutton failed to object to the omission in the jury instructions during trial, he procedurally defaulted his claim.[3]

***498** Where a petitioner cannot demonstrate the "cause and prejudice" necessary to overcome a procedural default, a court may reach the merits of a procedurally defaulted claim where review of the claim is necessary to correct or avoid a "fundamental miscarriage of justice." *See Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (finding that where a constitutional violation likely resulted in the miscarriage of justice, a federal court may grant habeas relief even in the absence of a

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[3] It should be well noted that Ohio law allows review of an unpreserved claim under the plain error standard. *See State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, 806–07 (1978). The basic inquiry in Ohio's plain error analysis is whether the defendant has been denied a "fair trial." *Scott*, 209 F.3d at 866. In determining that Hutton procedurally defaulted this claim, the Ohio Supreme Court did not analyze the constitutional challenge to the jury instructions on its merits, nor did it apply plain-error review when it noted the absence of a contemporaneous objection to the instruction. *See Hutton*, 797 N.E.2d at 959. Rather, the court merely ruled that Hutton's failure to object at trial operates as a procedural default.

showing of cause to overcome a procedural default). We first acknowledge, as the dissent points out, that Hutton did not raise this claim in his opening brief and it is, therefore, considered waived. As a general rule, this Court will not consider arguments not presented in a party's opening brief. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) (noting that " 'an appellant abandons all issues not raised and argued in its initial brief on appeal.'") (citations omitted). However, because this rule is procedural and not jurisdictional, the Court may excuse a default if the interest of justice so requires. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *United States v. Lawrence*, 735 F.3d 385, 430–31 (6th Cir. 2013).

The Supreme Court has extended fundamental miscarriage of justice in capital cases to mean actual innocence of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333, 347, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). "[T]o show 'actual innocence' one must show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 336, 112 S.Ct. 2514. This "actual innocence" standard must focus on the elements that render a defendant eligible for the death penalty. *Id.* at 347, 112 S.Ct. 2514. Despite the important interests served by state procedural rules, we cannot permit finality alone to provide a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254. *See Reed v. Ross*, 468 U.S. 1, 15, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In short, barring all procedurally defaulted claims is not the

standard. *See Scott*, 209 F.3d at 866. Relevant here, a criminal defendant has a right to expect that the trial court will give complete and correct jury instructions. *State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279, 1283 (1990). If there was a fundamental miscarriage of justice in imposing a death sentence, we may find that the petitioner overcame the procedural default.

Pursuant to O.R.C. § 2929.05(A), for death sentences, the Ohio Court of Appeals may independently determine whether (1) the record supports the jury's finding of the existence of aggravating circumstances; (2) the aggravating circumstances outweigh any mitigating circumstances; (3) trial court properly weighed the aggravating circumstances against the mitigating circumstances; (4) the sentence of death is not disproportionate to the penalty imposed in similar cases; and (5) the sentence of death is consequently appropriate.

Most relevant here is that, at the time the Ohio Court of Appeals independently reweighed the factors, the jury had not ***499** made the necessary finding of the existence of aggravating circumstances. Thus, the jury could not have determined that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt without knowing what the aggravating circumstances were. (Pet.'s Br. 43–44.) Without this finding, a death sentence cannot stand. Since the jury did not make the necessary aggravating circumstances finding, Hutton argues that the Ohio Court of Appeals made its own finding of the existence of aggravating circumstances, which

the Supreme Court has repeatedly ruled as unconstitutional. (*Id.*)

In *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016), the Supreme Court reiterated that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Relying on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court rejected the sentencing scheme in *Hurst* at issue because the court—and not the jury—ultimately made the "critical findings" about both "the existence and weight of aggravating circumstances" necessary to impose a death sentence. *Hurst*, 136 S.Ct. at 621.

In *Ring*, the Supreme Court rejected Arizona's capital sentencing scheme because the statute allowed a judge to find the facts necessary to sentence a defendant to death. Under state law, Ring could not be sentenced to death without the finding of at least one aggravating circumstance. *Id.* at 592, 122 S.Ct. 2428. The Supreme Court concluded that a state court judge's finding of an aggravating circumstance exposed Ring to greater punishment than that authorized by the jury's guilty verdict. *Id.* at 597, 122 S.Ct. 2428. Had the judge not engaged in any fact finding, Ring would have received a life sentence. *Id.* Thus, the Court ruled that Ring's death sentence violated his right to have a jury find the facts necessary to impose punishment. *Id.* In large part, this was because the Court found that judicial fact finding for aggravating circumstances under certain state sentencing schemes runs afoul of the rule in *Apprendi*, which states that any fact that "expose[s] the defendant to

a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

To be clear, the Supreme Court has also held that where a state appellate court conducts an independent review of the record, reweighs the mitigating and aggravating circumstances, and concludes that the death penalty was warranted, the Federal Constitution does not prevent a court from upholding that death sentence even though it was based in part on an invalid or improperly defined aggravating circumstance. *Clemons v. Mississippi*, 494 U.S. 738, 741, 750, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). In fact, we have held that "[c]onsideration of a non-statutory aggravating circumstance, even if contrary to state law, does not violate the Constitution." *Smith v. Mitchell*, 348 F.3d 177, 210 (6th Cir. 2003) (citing *Barclay*, 463 U.S. at 956–58, 103 S.Ct. 3418).

However, *Clemons* and this case are significantly distinguishable in two ways. First, in *Clemons*, only one or two invalidated aggravating circumstances were at issue, which means that the jury in *Clemons* was still given a list of *valid* aggravating circumstances to guide its decision. 494 U.S. at 741, 110 S.Ct. 1441. Even though the finding turned out to be an erroneous one, the jury in *Clemons* was given guidance in making a finding as to what aggravating circumstances existed or applied to the defendant's case. *Id.* Second, ***500** in reweighing the circumstances in *Clemons*, the state appellate court knew what the jury considered regarding

aggravating circumstances before reweighing the circumstances found by the jury. Reweighing in *Clemons* only required eliminating one or two aggravating circumstances but, arguably, the finding that the aggravating circumstances outweighed the mitigating circumstances was still largely valid because it was based on the jury's consideration of valid circumstances. *Id.* at 744, 110 S.Ct. 1441.

By contrast, here, the jury was not given an *improperly* defined aggravated circumstance. Instead, the court gave the jury no guidance as to what to consider as aggravating circumstances. Second, the jury was precluded from making the necessary findings of aggravating circumstances *in the first place*. There is nothing in the record that indicates that the jury's finding that the aggravating circumstances outweighed the mitigating ones was actually based on a review of any valid aggravating circumstances.

Thus, the analysis of the *Gregg* and *Ring* courts more aptly apply to Hutton's sentence. Hutton's death sentence was imposed by a judge's factual finding—not the jury's. Evidently, not wishing to permit appellate reweighing for every trial court's error, the *Clemons* Court specified that in "some situations," where there are "peculiarities" that make appellate reweighing speculative or impossible, reweighing may not cure the error. *Id.* at 754, 110 S.Ct. 1441.

Because a death sentence in Ohio cannot be imposed without an aggravating-circumstances finding, we need not consider at length whether a fundamental miscarriage of justice resulted from the

failure to define "aggravating circumstances" in the jury instructions. It clearly did, as the jury, without proper instructions, could not have made a finding that aggravating circumstances existed; thus, the harshest sentence Hutton could possibly have received without that instruction was life—not death. To find otherwise renders due process rights illusory. Thus, Hutton demonstrates a fundamental miscarriage of justice sufficient to overcome the procedural default of his first claim.

As previously mentioned, under AEDPA, the Court is required to defer to the state court's merits determination of a claim. *See* 28 U.S.C. § 2254(d). However, in the absence of a state-court determination on the merits of a claim, AEDPA's deferential standard has no application, and the Court reviews the claim de novo. *Henley v. Bell*, 487 F.3d 379, 390 (6th Cir. 2007) (citing *Linscott v. Rose*, 436 F.3d 587, 592 (6th Cir. 2006)). The Supreme Court's longstanding precedent in *Apprendi*, *Ring*, and *Gregg* establish that Hutton's constitutional rights were violated. Therefore, we are compelled by precedent to find that the Ohio Court of Appeals' findings of aggravating circumstances were not valid to permit a death sentence to stand.

B.

Hutton's second assignment of error is that Hutton's appellate counsel was ineffective for two reasons: first, counsel did not raise the claim based on the trial court's failure to define "aggravating circumstances" in the jury instructions, and second, counsel did not argue that trial counsel was ineffective for failing to object to the erroneous jury

instructions. Because the Ohio Supreme Court adjudicated this claim on the merits, *see Hutton*, 797 N.E.2d at 958–59, AEDPA applies to this claim.

Allegations of ineffective assistance of counsel are considered in two ***501** parts. First, we must determine whether the challenged act or omission fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, we must decide whether the defendant was prejudiced, such that there is a reasonable probability that, but for counsel's errors, the sentence would have been different. *Id.*

While we ordinarily presume that counsel's conduct falls within the range of reasonable professional assistance, *id.* at 691, 104 S.Ct. 2052, we do not require appellate counsel to raise every possible issue in order to render constitutionally effective assistance, see *Jones v. Barnes*, 463 U.S. 745, 750–53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Generally, only when omitted arguments are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

Although the district court focused on the second *Strickland* prong, the court does not need to reach that issue because counsel's performance was likely not deficient. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (finding that a court need not address both components of the inquiry if the defendant makes an insufficient showing on one). We cannot conclude here that the two omitted arguments were

"clearly stronger" than the other claims his counsel presented on direct appeal, five for which the Ohio Court of Appeals granted relief. Given the vacated sentence Hutton's counsel obtained for his client on direct appeal, Hutton cannot reasonably prove that his appellate counsel was deficient. Therefore, this claim fails.

C.

Under the third assignment of error, Hutton contends that the trial court's admission of Eileen Sweeney's testimony that he raped her denied him due process. (Pet.'s Br. 51–62.) Hutton argues that Sweeney's testimony was improper because Hutton had not been charged with rape and that the allegation bore no probative value to the murder and kidnapping charges. (R. 16–25, PageID 6528–29.) When Hutton raised this claim on direct appeal, the Ohio Court of Appeals granted relief, finding that "the jury received this damaging testimony over Appellant's objection and improperly considered it as further proof of the Appellant's commission of the aggravated and attempted murders and kidnappings." *Hutton*, 1988 WL 39276, at *22. The Ohio Supreme Court acknowledged the erroneous admission but reversed the court of appeals, deeming the error harmless because overwhelmingly strong evidence supported the murder and kidnapping convictions. *Hutton*, 559 N.E.2d at 440. Hutton also raised the claim on state post-conviction review and was subsequently barred by res judicata. The district court likewise denied Hutton habeas relief, stating that "Hutton has not explained how the Ohio Supreme Court 'used an improper standard to determine the error to be harmless' " as "it examined

the 'other admissible evidence, standing alone,' and found it to 'constitute [ ] overwhelming proof of guilt.' " (R. 67, Page ID 1703).

We agree. We review the admission for harmless error, assessing the alleged prejudicial impact under the "substantial and injurious effect" standard as established in *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). To warrant habeas relief, a questionable evidentiary admission must not only be erroneous, but it must also be ***502** so infirm that it rendered the trial fundamentally unfair, such that it had influence in determining the jury's verdict. *See Coe v. Bell*, 161 F.3d 320, 329 (6th Cir. 1998); *see also McCarley v. Kelly*, 801 F.3d 652, 665 (6th Cir. 2015). The *Brecht* test subsumes the limitations imposed by AEDPA. *McCarley*, 801 F.3d at 665 (citing *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2199, 192 L.Ed.2d 323 (2015)).

Hutton cannot show a substantial and injurious effect. In an effort to minimize the prejudicial impact of the testimony, the court gave the jury a limiting instruction admonishing the jury to refrain from considering the testimony "in any way, shape or form with respect to the determination of guilt or innocence" with regard to Hutton's charges. (R. 16–25, PageID 6531.) Hutton has not indicated how the state's adjudication of the claim was contrary to clearly established law. Notwithstanding the rape testimony, the record still contains strong circumstantial evidence that connects Hutton to the crime, such that the erroneous admission likely did not determine the jury's verdict. *Cf. Ford v. Curtis*, 277 F.3d 806, 810–11 (6th Cir. 2002). Accordingly,

the state court's disposition of the claim was neither unreasonable nor contrary to precedent. Hutton is not entitled to habeas relief on this ground.

D.

In Hutton's fourth assignment of error, Hutton contends that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding statements made to the police by Bernard Holloway and Kim Lampkin. (Pet.'s Br. 62.) However, Hutton raised this claim for the first time in his petition for post-conviction review. (R. 60, Page ID 1339.) The district court accordingly determined that the claim related to Holloway and Lampkin was procedurally defaulted because it was not raised in the state courts. (R. 67, Page ID 1681.) Notwithstanding the default, the district court still reviewed the merits of the claim and found that Hutton failed to meet the first two prongs of the *Brady* test. (R. 67, Page ID 1681–82.)

To overcome the default, Hutton had to establish cause and prejudice, which can be established by merely establishing the merits of his *Brady* claim. *See Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ("In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself.") To do so, Hutton must show that "(1) the evidence was favorable to him, (2) the prosecutor withheld the evidence, and (3) he suffered prejudice, which means that the suppressed evidence is material either to his conviction or his sentence." *Jones v. Bagley*, 696 F.3d 475, 486 (6th Cir. 2012) (citing *Strickler*, 527 U.S. at 280–82, 119 S.Ct. 1936). Favorable evidence can

only be "material" under *Brady* if a reasonable probability exists that, had the evidence been disclosed, the result of the proceeding would have been different. *Henness v. Bagley*, 644 F.3d 308, 324 (6th Cir. 2011) (quoting *Cone v. Bell*, 556 U.S. 449, 469–70, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009)).

i. Holloway's Statement

Holloway testified at trial that after Mitchell went missing, Hutton told Holloway that Mitchell and Simmons had been robbing numbers houses. In a withheld police report, Holloway mentioned only Simmons robbing the numbers houses.

Hutton contends that Holloway's withheld statement was material because Holloway "clearly implied in his trial testimony ***503** that Mr. Hutton told him about Mitchell and Simmons robbing the numbers house as a ruse to point suspicion for the murder towards the numbers people and away from himself." (Pet.'s Br. 64.) Hutton also argues that Holloway's withheld statement was a prior inconsistent statement that he could have used to impeach Holloway. However, neither statement would have "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles v. Whitley*, 514 U.S. 419, 441, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Holloway's statements made to police did not corroborate anything materially different from the testimony offered by Simmons, Jr. and Hutton, and the circumstantial evidence of the case. The record reveals that Holloway, in his testimony, primarily stated details about Hutton's visit to Holloway and Simmons' apartment, and Hutton's communication

with Mitchell and Simmons, Jr. about the sewing machine, a matter about which Holloway knew little.

Further, even if cause was established by Holloway's two inconsistent statements as to who Hutton said was involved in the alleged robbery of a "numbers house," Hutton still cannot show how he was prejudiced. Holloway testified on direct examination that he had been convicted of a "[s]tate drug law violation." Consequently, credibility may have been an issue for him. *See Byrd v. Collins*, 209 F.3d 486, 502 (6th Cir. 2000) (identifying a criminal conviction resulting in incarceration for more than one year as impeachment evidence); Ohio Evid. R. 609(A). Moreover, to the extent that Holloway's testimony corroborated Simmons, Jr.'s testimony, that corroboration was limited to testimony about when Hutton visited Holloway's apartment before the shooting of Simmons, which Hutton acknowledged in his own testimony. Hutton cannot demonstrate that a different outcome would have resulted had the prosecution disclosed Holloway's statement to the police.

ii. Lampkin's Statement

At trial, Lampkin testified that she knew Hutton and that after Simmons was shot, she became scared of Hutton and moved away. In a police statement that the prosecution never gave to Hutton, however, Lampkin said that she did not know Hutton.

Hutton argues that Lampkin's withheld statement was important for impeachment purposes because in her testimony, she implied that she was afraid of Mr. Hutton. However, this material would not have made his case markedly stronger. Any

potential impeachment of Lampkin would not have produced a different result. Therefore, the claim fails.

E.

Under Hutton's fifth assignment of error, Hutton contends that trial counsel was ineffective for failing to investigate and present available mitigation evidence. Specifically, he claims that his trial counsel was constitutionally ineffective during the guilt phase of the trial for failing to adequately consider and evaluate mitigating facts concerning (1) Hutton's neighbor, Allen Pollard; (2) Simmons, Sr.'s encounter with three men who were looking for Simmons, Jr. on the night of the shooting; (3) the likelihood of Simmons, Jr. owing money to a drug dealer at the time of the shooting due to his drug usage; and (4) information that the sewing machine belonged to Sharon Booker, and not Hutton's sister. He contends that further investigation would have changed the outcome of the trial.

Hutton raised the claim during the first state post-conviction proceedings, but the ***504** trial court applied res judicata as a procedural bar, reasoning that Hutton could have raised the claim on direct appeal but did not and therefore defaulted the claim. The trial court still reviewed the claim on its merits and found that he did not sufficiently demonstrate deficient performance under *Strickland*. The district court, on federal habeas corpus review, likewise imposed a procedural bar and found that the claim did not entitle Hutton to habeas relief. (R. 67 PageID 1637–40.)

Under Ohio's res judicata doctrine, a defendant may not raise a claim in a post-conviction proceeding that either could have been or actually was fully litigated at trial or on direct appeal. *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012). Ohio courts permit an exception where the defendant can establish an ineffective assistance of counsel claim based on references to evidence that are outside the record on direct appeal. *Id.*

Therefore, as with Hutton's other ineffective assistance claim, to overcome the procedural bar, Hutton must show deficient performance and prejudice, and that the state court's resolution of the claim was unreasonable. *Loza v. Mitchell*, 766 F.3d 466, 487 (6th Cir. 2014). First, concerning the alleged failure to interview Allen Pollard, the district court found that his testimony would have been cumulative of that offered at trial by his mother, Mary Pollard. (R. 67, PageID 1651.) Mary Pollard testified on the prosecution's behalf about events that occurred near her home on the night of the murder and how she was neighbors to Hutton and his mother. She also testified that after her husband left for work at midnight, she was upstairs in her room when she heard "a lot of knocking next door to me on the [side of the] Hutton's, like bamming on the door, bam, bam, bam." (R. 16–26, PageID 6927–28.) She testified that she heard a person yelling, "I'm shot. I'm shot." (R. 16–26, PageID 6929.) Then, as she described, someone began to knock on her door yelling, "I'm shot. I'm shot." (R. 16–26, PageID 6929.)

Although she testified that Allen was downstairs when the knocking started and that Allen reached

the front door before she did, she made it clear that neither she nor Allen left the house. (*Id.*) Mary Pollard's testimony further revealed—in mitigating form—that Sam Simmons left her yard when he heard Hutton driving by and acted "[l]ike he was glad to see" him. (R . 16–26, PageID 6941–42.) It was reasonable for the court to find that Allen's account of what happened that night was no different from the account his mother provided in trial.

Second, Hutton claimed that his trial counsel was ineffective for failing to investigate information provided by Simmons, Sr. that three men visited his home and asked where they could find Simmons, Jr. (Pet.'s Br. 73.) However, Hutton fails to explain how Simmons, Sr.'s encounter with the three men was relevant to his defense or how his counsel's decision to not use it prejudiced him. (R. 67, PageID 1648.) Therefore, he fails to demonstrate deficient performance and prejudice. Nor can Hutton do so with respect to his claim that counsel should have investigated witnesses to establish that the sewing machine belonged to Sharon Booker. That fact was proved at trial by Hutton's testimony.

Last, Hutton contends that trial counsel should have investigated Simmons, Jr.'s drug use and relationship with Mitchell. (Pet.'s Br. 74.) Despite Hutton's submission of four individual affidavits, the evidence presented at trial concerning Simmons, Jr.'s possible drug use was stronger. For instance, at trial, the jury ***505** heard testimony from the surgical resident who examined Simmons, Jr. in the emergency room after he was shot and who indicated

that Simmons, Jr. was likely using drugs. (R. 67, PageID 1648–50.)

Therefore, each asserted claim fails to establish a claim for ineffective assistance of counsel. The state court's rejection of this claim was not contrary to clearly established law nor did it involve an unreasonable application of clearly established law.

F.

Last, Hutton contends that trial counsel was ineffective because counsel did not object to the prosecution's use of Hutton's juvenile record as well as the prosecution's reference to a prior homicide conviction that had been overturned. (Pet.'s Br. 77; R. 16–29, PageID 7751.) Because trial counsel did not object, the Ohio Supreme Court reviewed the claim for plain error and found that none existed. *Id.* The state supreme court first found that "the [juvenile] record was part of the [presentence report] and therefore subject to fair comment by the prosecutor. Merely reading excerpts from the [presentence report] to the jury was not objectionable." *Hutton*, 559 N.E.2d at 446. As such, the court did not find any ineffective assistance of counsel. *Id.* The court, however, found that the prosecutor's comments to the jury that the prior murder conviction had been reversed were improper because this evidence was not contained in the presentence report. *Id.* at 442. But the court did not address the claim that trial counsel was ineffective for failing to object to these comments.

On federal habeas corpus review, the district court denied the ineffective assistance claim, finding that the Ohio Supreme Court's resolution was

neither unreasonable nor contrary to clearly established law. We agree. We have noted that "[b]ecause the decision to object in a particular instance is made in the strategic context of an entire trial, any single failure to object does not constitute error unless the information introduced 'is so prejudicial to a client that failure to object essentially defaults the case to the state.' " *Hodge v. Haeberlin*, 579 F.3d 627, 649 (6th Cir. 2009). Although trial counsel did not object to the prosecutor's comments, he clarified in his closing argument which conviction had actually been overturned, and the circumstances giving rise to the charged offenses. (R. 16–29, PageID 7754–55.) As with the other ineffective assistance claims, Hutton cannot establish prejudice proving that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

III.

Accordingly, we **REVERSE** the judgment of the district court and **CONDITIONALLY GRANT** habeas relief based on the first assignment of error, rejecting the remainder. We **REMAND** the case to the district court with instructions to order Hutton's release from custody unless the state grants a new sentencing hearing within 180 days from the date that the mandate issues from this Court.

MERRITT, Circuit Judge, concurring.

I do not agree with my colleagues' procedural ruling that the Eighth Amendment claim in this case has not been decided by the Ohio Supreme Court on

the merits but rather is procedurally defaulted. My colleagues appear to believe that we cannot review the merits of this claim directly in habeas corpus—due to a procedural default that kept the Ohio Supreme Court from reviewing it on the merits. On page 497 of her opinion, Judge Donald says, ***506** "Hutton defaulted this claim." Judge Rogers makes the same statement in the first paragraph of his dissenting opinion. My reasoning is that the Eighth Amendment claim, although not presented by Hutton's ineffective appellate counsel on direct appeal, was clearly and persuasively presented by three dissenting members of the Ohio Supreme Court. The full Ohio Supreme Court had clear notice of the issue. The habeas law on this subject appears to be that a state court is "presumed" to decide the merits of a federal issue when, as here, it has indisputable notice of the question explained by three members as decisive. In these circumstances, the state court cannot be regarded as not having ruled on the merits when it remains silent. In this case silence speaks volumes. The Supreme Court has held many times that

> when a state court issues an order that summarily rejects without discussion *all* the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits.

Johnson v. Williams, —— U.S. ——, 133 S.Ct. 1088, 1091, 185 L.Ed.2d 105 (2013) (citing *Harrington v. Richter*, 562 U.S. 86, 98–99, 131 S.Ct. 770, 178

L.Ed.2d 624 (2011)). If we are to adhere to *Johnson* and *Richter*, it makes no sense at all to create additional hurdles for Hutton to jump by ruling that the Ohio Supreme Court did not rule on the Eighth Amendment issue that three dissenting justices discussed at length as an obvious constitutional error. Although it is unclear why the Ohio Supreme Court majority did not respond to the dissenting justices' very clear, constitutional argument, it is clear, as the court acknowledged in a subsequent opinion in 2003, that the point was before the court. In upholding the death penalty, the majority simply chose to remain silent on the issue in order to avoid reversing the death penalty. Therefore, we must assume that the Ohio Supreme Court was aware of the issue and ruled against Hutton on the Eighth Amendment issue.

I. Hutton's Penalty Phase Invalid under Eighth Amendment

Three dissenting justices on the Ohio Supreme Court said that the imposition of the death penalty in this case is clearly unconstitutional under the Eighth Amendment and that the issue must be reached and decided. Of the seven members of the Ohio Supreme Court when the case was decided on direct appeal in 1990, three wrote an opinion upholding the death penalty in Hutton's case, one concurred in the result, and three dissented. The three dissenters wrote that the imposition of the death penalty here clearly violated the basic doctrinal requirement of *Gregg v. Georgia*, 428 U.S. 153, 196, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), that specific "aggravators" be present in the case and explicitly defined by the trial court and explained to

the jury as the aggravating factors to be weighed by the jury against mitigating evidence.

After ruling the death penalty unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court in *Gregg* reconsidered and required a capital sentencing system in which the jury must find "aggravating" factors in addition to simple murder and in which the trial court *must instruct the jury as to the process of weighing specific aggravators against mitigating evidence.*[1] ***507** The dissenting justices in Hutton's case noted that there were no such qualifying aggravator-mitigator instructions at Hutton's capital sentencing trial and that the capital sentencing proceeding clearly violated constitutional standards:

> Without any instruction [at sentencing] defining "aggravating circumstances," the jury was left "with untrammeled discretion to impose or withhold the death penalty." *Gregg v. Georgia* (1976), 428 U.S. 153, 196, at fn. 47, 96 S.Ct. 2909, 2936, at fn. 47, 49 L.Ed.2d 859. This, the United States Constitution forbids.

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[1] The finding of the here-undefined aggravators must be made by the jurors, not by the court or the prosecutor. The Supreme Court has subsequently held that this jury requirement includes the finding that the found aggravators outweigh the mitigators. *Hurst v. Florida*, ——U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). This entire process did not occur in the trial in this case in 1986—in part because apparently neither defense counsel nor the trial judge understood the basic Eighth Amendment "aggravator" requirement for imposing capital punishment.

State v. Hutton, 53 Ohio St.3d 36, 559 N.E.2d 432, 449 (1990).

The three dissenters explained the situation at trial as follows:

> The trial court's instructions to the jury correctly explained that the jury was required to weigh the aggravating circumstances against the mitigating factors, and could impose a sentence of death only if the aggravating circumstances outweighed the mitigating factors. Unfortunately, the court failed to tell the jury what the "aggravating circumstances" were.
>
> ....
>
> No jury (or anyone else) can weigh aggravating circumstances against mitigating factors without knowing what the aggravating circumstances are. This weighing process is the very purpose of the sentencing phase of a capital trial.

Id. at 448–49.

The three dissenting justices also found that "defendant's counsel did not object at trial" to this constitutional error, an error that was so obvious after the *Gregg* case that the justices found it to be "plain error" on the part of counsel and the lower court. As stated above, the three justices who joined the single justice concurring in the result to make a majority simply did not discuss this Eighth Amendment issue at all. They simply remained silent on the issue. Although the majority did discuss ineffective assistance of counsel on several

other points, they avoided any discussion of whether trial counsel should have raised this issue that the dissenters viewed as so obvious as to be "plain error." Under such circumstances, we must presume that the majority of the Ohio court rejected the Eighth Amendment issue 4–3.

In the Ohio Supreme Court's second opinion delivered in 2003 after a remand, it clearly mentioned the fact that the trial court failed to define the "aggravating circumstances" and itself suggested the possibility of "plain error." But then instead of deciding the Eighth Amendment question based on plain error, as found by their dissenting colleagues in the earlier opinion, the Ohio Supreme Court again simply did not discuss the question further. It immediately shifted its focus and treated the constitutional problem as a Sixth Amendment issue of ineffective assistance of counsel. Skipping over the Eighth Amendment issue that the three dissenting justices had decided in favor of Hutton, the Ohio Supreme Court simply concluded without elaboration: "Failure to raise the waived instructional issue was not deficient performance constituting ineffective assistance of counsel." *State v. Hutton*, 100 Ohio St.3d 176, 797 N.E.2d 948, 959 (2003).

***508 II. Ineffective Assistance of Counsel**

Federal judges should not go out of their way to foreclose and prevent themselves from reaching the merits of a constitutional issue that must be decided in favor of the accused if reached—especially in a death case. That is the case here. No one can claim here that Hutton did receive a fair trial, as the

dissenting Ohio justices make clear. If federal judges are going to stretch their minds a bit, it should be in favor of reaching the merits so that they make sure that justice is done. But if Hutton's Eighth Amendment claim was procedurally defaulted in the state court, I would find, unlike my colleagues, that he suffered ineffective assistance of counsel by both trial and appellate counsel so as to overcome the default. I would also necessarily find that Hutton's independent claim of ineffective assistance of counsel is meritorious.

Under *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Hutton's counsel "fell below an objective standard of reasonableness," and "the deficient performance prejudiced the defense" when trial counsel failed to identify and object to the faulty jury instruction during the penalty phase. It is undisputed that the failure to give the omitted instruction was error and the error was recognized by three of the Ohio Supreme Court justices as plain error. I would find defense counsel's failure to object in this circumstance, more than ten years after the Supreme Court's opinion on aggravators in *Gregg v. Georgia*, to constitute ineffective assistance of counsel. As for appellate counsel, the contention that the Eighth Amendment issue arising from the failure to give the instruction on aggravating circumstances was not equal to or stronger than the issues actually raised by appellate counsel on direct appeal is without merit as confirmed by the issue serving as the sole basis for the dissent by the three Ohio Supreme Court justices. There can be no dispute that Hutton was prejudiced by the ineffectiveness. Hutton has

therefore clearly demonstrated cause and prejudice through ineffective assistance of counsel to excuse any default on the Eighth Amendment issue. This may also amount to a due process error but, as described above, the "untrammeled discretion" of the jury during its weighing of aggravators and mitigators allowed the jury to impose the death penalty in violation of the Eighth Amendment.

I would also find along with Judge Donald that a miscarriage of justice would occur if any procedural default were not excused and we failed to reach the merits of Hutton's Eighth Amendment claim. The Supreme Court has stated that

> in all cases in which a state prisoner has defaulted his federal claim in state court pursuant to an independent and adequate state procedural rule, federal habeas corpus review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice.

Lundgren v. Mitchell, 440 F.3d 754, 763 (6th Cir. 2006) (quoting *Coleman v. Thompson*, 501 U.S. 722, 749, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). Hutton had a constitutional right to have a jury weigh the two statutory aggravators against the mitigators. By omitting the instruction on the proper aggravators to be considered, the trial court allowed the jury unfettered discretion and violated Hutton's Eighth Amendment right. There is a reasonable likelihood that the result of the penalty phase would have been

different had the jury been properly instructed. To allow the ***509** death sentence to be carried out when a crucial part of the procedure for choosing between life and death was omitted would be a serious miscarriage of justice.

Now twenty-five years later when Hutton makes the argument on both the Eighth and Sixth Amendment issues, the state, as well as our dissenting colleague, falls back on procedural default and AEDPA to avoid the merits. In my view, the argument of the dissenting justices of the Ohio Supreme Court, and the full court's rejection of it, should not block a federal court in habeas from reaching and deciding the merits of the issues in this capital case. And when we reach the merits, there is only one answer. The trial was unconstitutional, as the dissenting justices found.

I would issue the writ of habeas corpus for these reasons and give the state an opportunity to retry the sentencing phase of the case. But now 30 years after the crime and the beginning of Hutton's incarceration, I do not believe it would be constitutional under the Eighth Amendment's standard of "evolving standards of decency that mark the progress of a maturing society" to impose the death penalty. *Trop v. Dulles*, 356 U.S. 86, 100–01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). The reimposition of the death penalty 30 years later is certainly "unusual," if not unique, and death is different in kind from any other punishment.

ROGERS, dissenting in part.

Percy Hutton's jury-instructions claim is procedurally defaulted, as it was not raised on direct appeal in the state courts. Hutton concedes as much.[1] Review of that claim is possible, then, only by finding cause and prejudice for the default (which the lead opinion does not do), or by stretching the narrow "fundamental miscarriage of justice" exception far beyond its proper bounds (which the majority does). Not only does that exception to procedural default not apply in this case, but Hutton never even raised the exception in the district court or on appeal, waiving the argument in that court and in this one. The procedural rules that constrain federal-court oversight of state criminal proceedings should not be so lightly brushed aside.

Federal courts generally do not entertain claims that are procedurally barred by an "independent and adequate state procedural rule" unless a valid "cause" excuses the default. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640

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[1] Judge Merritt contends that there was no procedural default because the Ohio Supreme Court's silence on Hutton's claim is a ruling on the merits. Even if the Ohio Supreme Court's deciding on the merits somehow means there was no default by Hutton, this court cannot presume that the state-court majority dismissed the claim on the merits just because three dissenting justices discussed the claim, when Hutton did not even raise the claim on his direct appeal to the state court. Furthermore, even if such a presumption were appropriate, it would be overcome in this case. As the lead opinion notes, the state-court majority expressly stated it was *not considering the merits* of Hutton's jury-instructions claim. *See State v. Hutton*, 53 Ohio St.3d 36, 559 N.E.2d 432, 437 n.1 (1990).

(1991). Throughout federal and state post-conviction litigation, Hutton has given only one reason for his failure to present the jury-instructions claim on direct appeal: ineffective assistance of appellate counsel. The ineffective-assistance claim is premised on appellate counsel's failure to raise the jury-instructions issue and trial counsel's purported ineffectiveness for failing to object to the instructions. As the lead opinion concludes, however, the ineffective-assistance claim warrants no relief, *see* Lead Op. *ante* at 500–02, and so that claim cannot excuse Hutton's default.[2]

***510** That leaves one possible ground for reviewing the merits of Hutton's jury-instructions claim: the so-called fundamental-miscarriage-of-justice exception to procedural default, an argument

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[2] Judge Merritt states that Hutton "suffered ineffective assistance of counsel by both trial and appellate counsel so as to overcome the default." Merritt Op. *ante* at 508. Even if defense counsel prejudiced Hutton by deficiently failing to object to the jury instruction during the penalty phase of trial, the lead opinion correctly concludes that appellate counsel's failing to raise an ineffective-assistance claim based on this failure was not deficient, *see* Lead Op. *ante* at 501–02. The Ohio Court of Appeals reversed the judgment on five of appellate counsel's assignments of error. *State v. Hutton*, No. 51704, 1988 WL 39276, at *6 (Ohio Ct. App. Apr. 28, 1988), *rev'd*, 53 Ohio St.3d 36, 559 N.E.2d 432 (1990). It cannot be that under these circumstances appellate counsel's failure to raise one other colorable issue amounts to conduct that is so woefully inadequate as to constitute ineffective assistance. Furthermore, a court must evaluate the objective reasonableness of counsel's conduct without "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

that Hutton has waived. The exception is a narrow one, applying only in "extraordinary case[s]." *Gibbs v. United States*, 655 F.3d 473, 477 (6th Cir. 2011) (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). To obtain a merits review of a constitutional claim, a petitioner asserting this exception must generally show that an "alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense." *Dretke v. Haley*, 541 U.S. 386, 388, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004) (citing *Murray*, 477 U.S. 478, 106 S.Ct. 2678; *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)). In addition to cases involving factual innocence, the exception has been applied in the capital sentencing process, but only to the small subset of cases where a habeas "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [state] law." *Sawyer*, 505 U.S. at 348, 112 S.Ct. 2514. In such a case, the petitioner can be said to be "innocent" of the death penalty, even if he is factually guilty of the capital crime. But Hutton has never argued, in this court or in the district court, that he is ineligible for the death penalty. He has therefore unquestionably waived the issue. Hutton's decision not to raise the argument at any point in federal litigation prevents us from analyzing whether he satisfies the fundamental-miscarriage-of-justice exception. *See Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013); *see also Foster v. Michigan*, 573 Fed.Appx. 377, 392–93 (6th Cir. 2014).

In any event, Hutton had good reason not to argue that exception. Any argument concerning the fundamental-miscarriage-of-justice exception would have been a losing one, as a jury would have been authorized to impose the death penalty if the jury instructions had correctly defined "aggravating circumstances." The proper inquiry is not whether a defendant is eligible for the death penalty even with the alleged error. *Compare* Lead Op. *ante* at 500–01. The exception instead focuses on what would have happened if no error had occurred. The *Sawyer* Court used the phrase "but for constitutional error," *Sawyer*, 505 U.S. at 348, 112 S.Ct. 2514, a phrase that requires courts to ask whether, assuming that no error had occurred, a jury would have been authorized by state law to impose the death penalty.[3] In applying that ***511** standard, *Sawyer* thus analyzed whether evidence that the state should have furnished to the defendant would have prevented the jury from finding either of the necessary conditions for imposing the death penalty—that the defendant was guilty of the crime and that one or more aggravating circumstances applied. *See id.* at 349–50, 112 S.Ct. 2514.

Hutton's eligibility for the death penalty is indisputable. A defendant becomes death-eligible in

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[3] The Supreme Court in *Sawyer* also endorsed an Eleventh Circuit decision that stated the same test in different words. That formulation required a petitioner to "show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty." *Sawyer*, 505 U.S. at 347 n.15, 112 S.Ct. 2514 (quoting *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (en banc)).

Ohio when the jury convicts him of a capital murder count with an attached "specification," as that is the point at which the death penalty is placed on the table. *See Wilson v. Mitchell*, 498 F.3d 491, 495 & n.2 (6th Cir. 2007). "Imposition of the death penalty for aggravated murder is precluded unless one or more [statutorily defined specifications] is specified in the indictment . . . and proved beyond a reasonable doubt." Ohio Rev. Code § 2929.04(A). A specification is an "eligibility factor" that satisfies the Eighth Amendment's narrowing requirement. *Wilson*, 498 F.3d at 505; *see also Brown v. Sanders*, 546 U.S. 212, 216, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006). In this case, the jury found two such factors—mass murder and felony murder—in the process of convicting Hutton of two counts of aggravated murder. Both factors were included in the indictment. That rendered Hutton eligible for the death penalty.

As there is no question about the validity of the two specifications, any error in the *penalty-phase* jury instructions did not affect Hutton's eligibility for the death penalty. The weighing of aggravating circumstances against mitigating evidence does not relate to eligibility. "Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it." *Sanders*, 546 U.S. at 216, 126 S.Ct. 884. At sentencing, the jury thus weighs the aggravating circumstances that "the offender was found guilty of committing" against the mitigating evidence. *See* Ohio Rev. Code § 2929.03(D)(2). (The mass murder and felony murder specifications in Hutton's

indictment doubled as aggravating circumstances for sentencing purposes. *See id.* § 2929.04(A)(5), (7).) Any infirmity in the instructions on weighing does not negate a defendant's earlier-determined eligibility.

A hypothetical example demonstrates how this case is different from the type of case that the fundamental-miscarriage-of-justice exception targets. Assume that a defendant was convicted of aggravated murder and that the only aggravating circumstance that the prosecutor argued was an "especially heinous, atrocious, or cruel" factor. At sentencing, the jury weighed that factor against the mitigating evidence en route to the conclusion that the death penalty was warranted. In such a case, the defendant on federal habeas review might be able to show that he was not eligible for the death penalty, allowing the court to reach the merits of his procedurally defaulted claim that an error affected his sentence. That is because the "heinous, atrocious, or cruel" factor is unconstitutionally vague in most applications, *see Maynard v. Cartwright*, 486 U.S. 356, 364–65, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and no other aggravating circumstances were present in the case. "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating ***512** circumstance or that some other condition of eligibility had not been met." *Sawyer*, 505 U.S. at 345, 112 S.Ct. 2514. Because no valid aggravating factors supported the defendant's death sentence in the hypothetical, the defendant would be "actually

innocent" of that penalty. The same cannot be said of this case.

The Supreme Court's decisions in *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), have nothing to do with whether Hutton is eligible for the death penalty. "[A] claim of 'actual innocence' is . . . a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Gibbs*, 655 F.3d at 477 (quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993)). *Hurst* and *Ring* are relevant, if at all, to the merits of Hutton's claim that constitutional error occurred when the trial judge failed to define the aggravating circumstances. Yet the merits are not reviewable in the context of this case. A federal habeas court has no business reaching a defaulted claim if the petitioner can show neither cause for the default nor that he was innocent of the death penalty.

Even if it were proper to reach the merits, the Supreme Court's decisions in *Hurst* and *Ring* do not require the conclusion that constitutional error occurred. In those cases, state law required a judge, at a separate penalty hearing, to find aggravating circumstances before sentencing a defendant to death. *Hurst*, 136 S.Ct. at 619; *Ring*, 536 U.S. at 588, 122 S.Ct. 2428. The Ohio capital system, however, does not work that way. In Ohio, the jury weighs aggravating circumstances and mitigating evidence at sentencing *after* it has already found the aggravating circumstances at the guilt stage. Here, the jury found the mass-murder and felony-murder

circumstances at the guilt phase. *Compare* Maj. Op. *ante* at 498–99. What is more, the trial judge in the penalty-phase instructions reminded the jury that it had made those findings, instructing the jury that "[t]he prosecution has the burden to prove beyond a reasonable doubt that the aggravating circumstances, *of which the Defendant was found guilty*, outweigh the factors in mitigation of imposing the death sentence." (Emphasis added.) This is therefore not a case in which the jury found no aggravating circumstances, but rather a case in which the jury found aggravating circumstances and later received instructions that did not spell out the aggravating circumstances that the jury had previously found.

That distinction makes all the difference for Sixth Amendment purposes. As we indicated in *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009), another Ohio death-penalty case, a state-law error in penalty-phase instructions on weighing may be cured by appellate reweighing of the aggravating circumstances and the mitigating evidence. In that case, the state trial judge erroneously instructed the jury at the penalty phase to consider the *quantity* of the evidence in the weighing analysis rather than the quality. *Id.* at 397. In rejecting an ineffective-assistance claim, we held that any argument that trial counsel could have raised would not have been a strong one, reasoning that "[t]he Ohio Supreme Court has consistently held that . . . 'careful independent reweighing' cures errors by the jury or trial court in 'weighing the aggravating circumstances against any mitigating factors.' " *Id.* at 399 (quoting *State v. Lott*, 51 Ohio St.3d 160, 555

N.E.2d 293, 304 (1990)); *see also Hoffner v. Bradshaw*, 622 F.3d 487, 506 (6th Cir. 2010). Nowhere did we suggest that a penalty-phase error in jury instructions runs afoul of the *Ring* line of cases. In this case, ***513** as in *Webb*, the jury found the aggravating circumstances at the guilt phase, before the error in the penalty-phase instructions. And here, as in *Webb*, the Ohio Court of Appeals concluded that the death sentence was appropriate after reweighing the aggravating circumstances against the mitigating evidence. *See State v. Hutton*, 72 Ohio App.3d 348, 594 N.E.2d 692, 694 (1991). There is thus strong reason to doubt the merit of Hutton's claim.

The judgment of the district court denying Hutton relief should be affirmed. I join all of the lead opinion except Parts II.A and III.

APPENDIX C

2013 WL 2476333

United States District Court,
N.D. Ohio,
Eastern Division.

Percy HUTTON, Petitioner,
v.
Betty MITCHELL, Warden, Respondent.

No. 1:05CV2391.
|
June 7, 2013.

Attorneys and Law Firms

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MEMORANDUM OF OPINION

CHRISTOPHER A. BOYKO, District Judge.

*1 This matter is before the Court upon Petitioner Percy Hutton's ("Hutton" or "Petitioner") Amended Petition for Writ of Habeas Corpus.

Pursuant to 28 U.S.C. § 2254, Petitioner filed an Amended Petition for Writ of Habeas Corpus, challenging his conviction and sentence of death

rendered by an Ohio court. (ECF No. 60.) The Respondent, Warden Betty Mitchell ("Respondent"), filed a timely Return of Writ, and Hutton filed an Amended Traverse. (ECF Nos. 64 and 66, respectively.)

For the following reasons, the Amended Petition for Writ of Habeas Corpus is denied.

I. Factual History

On October 16, 1985, a Cuyahoga County Grand Jury issued a five-count Indictment against Hutton. The Indictment charged Hutton with two counts of murdering Derek Mitchell ("Mitchell") in violation of Ohio Revised Code § 2903.01. The first count charged that he committed the murder with prior calculation and design pursuant to Ohio Revised Code § 2903.01(A). The second charged him with murdering Mitchell while committing, attempting, or fleeing the commission or attempted commission of kidnapping, pursuant to Ohio Revised Code § 2903.01(B). Each murder count carried one firearm specification, Ohio Revised Code § 2929.71(A), and two capital specifications: a course-of-conduct specification, Ohio Revised Code § 2929.04(A)(5), and a felony-murder specification of kidnapping, Ohio Revised Code § 2929.04(A)(7). Hutton also was indicted for kidnapping Mitchell and Samuel Simmons Jr. ("Simmons"), in violation of Ohio Revised Code § 2905.01, and for the attempted murder of Simmons, in violation of Ohio Revised Code § 2911.11. Each count carried a firearm specification. Hutton entered a plea of not guilty to all charges.

The Ohio Supreme Court set out the following factual history, as adduced by the evidence presented at trial, upon considering Hutton's direct appeal of his convictions and sentence:

> On Friday, September 13, or Saturday, September 14, 1985, Percy "June" Hutton confronted Samuel Simmons, Jr. outside Simmons's home and accused him of stealing a sewing machine belonging to Hutton. Claiming that he had seen Simmons's friend Derek "Ricky" Mitchell trying to sell the machine, Hutton demanded that Simmons give the machine back immediately. Simmons suggested that Hutton "go talk to Ricky."
>
> When Mitchell arrived, Hutton went upstairs with him. When they came back down, according to Simmons, Hutton said that "it wasn't what he was looking for and if he found out we had anything to do with what was missing or stolen he was going to kill us."
>
> The following Monday morning, September 16, Hutton went back to Simmons's home at about 12:00 a.m. and asked him to work on a car. Hutton and Simmons got into Hutton's car, where Bruce Laster was waiting for them. When he got in, Simmons saw a .22 caliber rifle on the back seat. Hutton drove them to Mitchell's house saying, "I want to talk to you and Ricky, man." When they arrived, Simmons told Mitchell that "June wanted to talk to him."
>
> *2 After accusing Mitchell of stealing tires from Hutton's back yard, Hutton demanded

the return of his sewing machine, in which he had hidden $750. Mitchell denied taking the machine. Hutton insisted that Mitchell had tried to sell the machine to a Mr. Evans and demanded that Mitchell come with him to Evans's house. According to Simmons, Hutton said: " * * * If Evans said you ain't the one who tried to sell him the sewing machine, * * * I will apologize. If he say you tried to sell the sewing machine, that mean I'm f___ing you up. * * * "

Mitchell and Simmons got into the car. Hutton pointed the rifle at Simmons's side and said that he didn't appreciate Simmons and others breaking into his sister's house.

Instead of going to Evans's house, Hutton drove to a parking lot behind a bus depot on 93rd Street. He ordered Mitchell out of the car. Mitchell and Hutton walked away from the car so that Simmons could not hear their conversation, but he saw Hutton put a pearl-handled, nickel-plated, .22 caliber automatic pistol to Mitchell's head.

Hutton and Mitchell returned to the car. Following Mitchell's directions, Hutton drove to a building on 30th Street. Hutton and Mitchell went inside for a few minutes and emerged with a white sewing machine case.

Hutton drove to his mother's house, took the case inside, and returned to the car. Hutton drove a short distance and parked in an alley next to a brown El Dorado. Simmons got out.

Hutton moved his car to the other end of the street. He then walked back to the El Dorado.

Simmons got behind the wheel as Hutton "went under the hood" and said, "Try to start it." He then walked back to Simmons and shot him twice in the head.

Simmons, unable to move, lay partly in and partly out of the car and cried for help. No one responded. He managed to get up and stagger to two nearby houses to seek aid. Hutton found him pounding on the back door of the second house and told him to get into the car. Telling Mitchell that someone had shot Simmons, Hutton then drove Simmons to St. Luke's Hospital.

At the hospital, Simmons asked Mitchell to go inside with him. Mitchell refused and said they were going to get the person "that did this to you." Simmons then got out of the car and went into the hospital by himself.

At 2:30 a.m., Mitchell, Hutton, and Laster returned to Mitchell's apartment. They woke Mitchell's alleged common-law wife, Eileen Sweeney, and, taking her to the hospital, they dropped her off and left. Sweeney went in to visit Simmons. Telling her that Hutton had shot him, Simmons sent her to warn Mitchell to get out of the car. She went outside, but the car had gone. She never saw Mitchell again.

Half an hour later, Hutton and Laster returned to the hospital. Hutton told Sweeney that Mitchell was home and offered to take her

there. Instead, Hutton took Sweeney to a park, where he raped her vaginally and orally. Hutton had a small handgun with a white handle and a silver-colored barrel. During the rape, Hutton advised Sweeney to "forget about" Mitchell because "Ricky wasn't coming back."

*3 After the rape, Hutton took Sweeney home. The door to the apartment had been damaged and the apartment was in disarray. Mitchell was not there. Too "scared and nervous" to drive, Sweeney accepted Hutton's offer to drive her to the home of Mitchell's sister LaWanda. Hutton accompanied Sweeney into LaWanda Mitchell's house. Sweeney testified that "[H]e told me, Ricky wasn't coming back, and if I told[,] someone would be looking for me ."

On September 30, a decomposing corpse was found near the intersection of East 88th Street and St. Catherine Avenue, Cleveland. A large tire lay on the corpse. The autopsy disclosed that the body was Derek Mitchell's, and that Mitchell had been shot to death. Two bullets were recovered. A firearms expert identified them as .22 caliber long rifle ammunition that could have been fired from either a rifle or a handgun. The bullets that killed Mitchell had the same class characteristics as a bullet that had been removed from Simmons's head, but the expert could not tell whether all three had been fired from the same gun.

* * *

> Hutton's defense was that Mitchell was not killed on September 16, but at some later time when Hutton was in Indianapolis. Denise Richardson testified that she saw Mitchell alive and spoke to him at about 3:00 p.m. on September 17, 1985, the day after the state claimed Mitchell was murdered. According to Hutton, he was in Indianapolis at the time Richardson spoke to Mitchell and stayed there until October 3, except for two brief visits to Cleveland on September 21 and 28. An employee of the Fall Creek branch of the Indianapolis YMCA saw Hutton there sometime after 4:00 p.m. on September 17. She testified that he paid rent covering the period September 17 to October 3.

State v. Hutton, 53 Ohio St.3d 36, 37–39, 559 N.E.2d 432, 436–38 (Ohio 1990).

II. Procedural History

A. State-Court Proceedings

Hutton's trial commenced on January 3, 1986. He was represented by Attorney Merlin Hill. A jury returned a verdict of guilty as to all counts and the capital specifications on January 29, 1986. The penalty phase of the trial commenced on February 3, 1986. Two days later, on February 5, 1986, the jury recommended that Hutton be sentenced to death. The trial court accepted the jury's recommendation and sentenced Hutton to death on February 7, 1986.

Hutton filed a timely appeal of the trial court's decision to the Eighth District Court of Appeals,

represented by Attorney Floyd Oliver. He raised fourteen assignments of error as follows:

> I. Death qualification of the guilt phase jury in a capital case violates the Appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and Article I § § 2 and 10 of the Ohio Constitution.
>
> II. Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 2, 9, 10 and 16 of the Ohio Constitution.
>
> *4 III. In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 9 and 16 of the Ohio Constitution, the Appellant's sentence of death is inappropriate and disproportionate to similar cases.
>
> IV. The trial court erred in permitting the introduction of evidence of irrelevant prejudicial "other acts" of Appellant, and thereby deprived him of his rights to due process of law and to a fair trial, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I § 16 of the Ohio Constitution.
>
> V. The trial judge abused his discretion by allowing into evidence a series of gruesome photographs which contained little probative value, thereby denying Appellant's

constitutionally guaranteed right to a fair trial.

VI. The trial court erred in limiting both re-direct and re-cross examination offered by defense counsel, thereby denying Appellant his United States and Ohio constitutional rights to a fair trial, due process of law, and confrontation.

VII. Prosecutorial misconduct during trial and final argument to the jury denied Appellant his Fourteenth Amendment due process right to a fair and impartial trial.

VIII. The trial court erred in overruling Appellant's motions for acquittal, which denied him due process of law, as guaranteed by the United States and Ohio Constitutions.

IX. The trial judge erroneously instructed the jury to exclude consideration of bias, prejudice or sympathy for the accused, thereby depriving Appellant of evidence in mitigation and consideration of that mitigation in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Ohio Constitution Article I §§ 9 and 16.

X. The trial court and the prosecutor instructed the jury throughout the trial that their decision in the penalty phase is only a recommendation in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 9, 10 and 16 of the Ohio Constitution.

XI. The trial court erred in dismissing a juror after the guilt phase but prior to the penalty phase, contrary to Ohio Criminal Rule 24(F) and R.C. § 2929.03(C)(2)(b), thereby denying Appellant his United States and Ohio constitutional rights to a fair trial and due process.

XII. Ineffective assistance of counsel at trial deprived the Appellant of his right to effective assistance of counsel as guaranteed by the Ohio and United States Constitutions.

XIII. Ineffective assistance at the penalty phase deprived Appellant of a fair and complete hearing as to the appropriate sentence, thereby denying Appellant of his rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 9 and10 of the Ohio Constitution.

XIV. The combination of errors occurring throughout both the guilt and the penalty phase deprived the Appellant of his constitutionally guaranteed right to a fair trial.

(App. to Return of Writ, vol. 3, 13–14.)[1]

***5** The Court of Appeals, in a split decision, reversed Hutton's conviction and sentence and

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[1] Hutton filed a second Notice of Appeal in the Eighth District Court of Appeals on April 14, 1986. The court of appeals dismissed that appeal as duplicative of his first appeal. (App. to Return of Writ, vol. 4, 2, 5.)

remanded the case to the Common Pleas Court for further proceedings. The majority opinion concluded that the following four assignments of error were well-taken and required reversal: the trial court's improper admission of "other acts" evidence, including Hutton's alleged rape of Eileen Sweeney; the trial court's improper restriction of defense counsel's ability to re-cross-examine and rehabilitate witness Mary Etta Pollard concerning Hutton's prior criminal charges; prosecutorial misconduct during trial and closing argument when prosecutors revealed Hutton's criminal history with regard to charged offenses that did not result in convictions; and the ineffective assistance of defense counsel at the penalty proceedings. *State v. Hutton,* No. 51704, 1988 WL 39276, at ——20, 22, 25, 29 (Ohio Ct.App. Apr. 28, 1988). The majority opinion also found that the trial court erred in overruling Hutton's motions for acquittal on the charges of kidnapping and aggravated murder of Mitchell, although it determined that the trial court properly overruled Hutton's motion for acquittal with regard to the attempted murder and kidnapping of Simmons. *Id.* at ——12–15. A concurring opinion, however, concluded that Hutton's conviction should be reversed on narrower grounds. It agreed with the findings of error in the admission of Eileen Sweeney's testimony concerning the alleged rape and the ineffective assistance of defense counsel during the penalty phase of the trial. It also concurred that the trial court erroneously restricted the scope of defense counsel's re-cross-examination of Mrs. Pollard, but did not find the error prejudicial. It also disagreed with the finding of error in the trial court's

overruling of Hutton's motions for acquittal, and found error with the court's admission of prejudicial photographs. *Id.* at *32. Finally, a dissenting opinion found no error in the two grounds the majority agreed warranted reversal, namely, the "other acts" evidence and the ineffective assistance of counsel. *Id.* at *41.

The State appealed this judgment, and Hutton cross-appealed, alleging that the court of appeals erred in overruling several of his propositions of law. Hutton again was represented by Attorney Floyd Oliver. The State advanced the following propositions of law:

> I. Evidence Rule 404(B) generally proscribes the use of other crimes, wrongs or acts independent of the offense for which the defendant is on trial where that evidence is used to demonstrate that the defendant has a propensity for crime or that his character is in conformity with the other acts. This general rule of exclusion does not apply where the evidence of another crime is relevant to prove the accused's guilt of the crime charged or to connect him with it, and the evidence is not offered merely to show propensity or disposition on the part of the accused to commit the crime.
>
> ***6** II. A request for a pre-sentence report in a capital case, including a summary of the defendant's prior arrests and convictions, does not per se constitute ineffective assistance of counsel.

III. Testimony of a character witness regarding collateral matters may be limited as irrelevant.

IV. A prosecutor does not commit prosecutorial misconduct when he questions a character witness regarding the defendant's specific acts which tend to refute the witness' opinion of the defendant's character even if these specific acts constitute criminal behavior, the conviction for which was overturned on appeal.

V. A prosecutor does not commit prosecutorial misconduct when he reviews for the jury in the penalty phase of a capital case evidence presented by the defense concerning the defendant's prior criminal record.

VI. A motion for acquittal pursuant to Criminal Rule 29(A) is properly denied when the State presents sufficient evidence that a jury may reasonably find that each element of the crime has been found beyond a reasonable doubt.

VII. When a sentence of death is imposed the court of appeals must review the sentence of death at the same time it reviews the other issues in the case.

(App. to Return of Writ, vol. 6, 130–32.)

Hutton asserted the following propositions of law in his cross-appeal:

I. Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to

the United States Constitution and Article I §§ 2, 9, 10 and 16 of the Ohio Constitution.

II. In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 9 and 16 of the Ohio Constitution, the Appellant's sentence of death is inappropriate and disproportionate to similar cases.

III. The admission of gruesome photographs is subject to the trial court's discretion. Where the photographs' probative value is outweighed by the prejudicial effect, the introduction of such photographs is prejudicial error.

IV. During the penalty phase, the trial court may not instruct the jury to exclude consideration of sympathy. This instruction is violative of the Eighth and Fourteenth Amendments of the United States Constitution.

V. The sentencing instruction informing the jury their death recommendation is not binding on the court while their life verdict is binding, unconstitutionally diminished the jury's responsibility for imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

VI. The dismissal of a juror after the deliberation of guilt but prior to the deliberation of penalty is violative of the Ohio Rule of Criminal Procedure 24(F), R.C.

§ 2929.03(C)(2)(b) and the Eighth and Fourteenth Amendments of the United States Constitution.

VII. Trial counsel's failure to object to the inclusion of prejudicial non-statutory aggravating factors and failure to object to prejudicial jury instructions during the penalty phase of trial deprived the defendant his right to effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

*7 (App. to Return of Writ, vol. 6, 296–98.)

The Ohio Supreme Court, in another split decision, reversed the decision of the Court of Appeals on August 8, 1990, and remanded the case back to the Court of Appeals for an independent review of the sentence.[2] *State v. Hutton,* 53 Ohio St.3d 36, 50, 559 N.E.2d 432, 447–48 (Ohio 1990). Hutton filed a motion for rehearing on August 20, 1990, which the Ohio Supreme Court denied on October 3, 1990. *State v. Hutton,* 54 Ohio St.3d 710, 561 N.E.2d 945 (Ohio 1990). The Eighth District Court of Appeals then affirmed Hutton's death sentence on January 17, 1991. *State v. Hutton,* 72 Ohio App.3d 348, 594 N.E.2d 692 (Ohio Ct.App.1991).

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[2] Chief Justice Moyer wrote the majority opinion, with two judges concurring, one judge concurring in the syllabus and judgment only, and three judges concurring in part and dissenting in part.

Hutton filed a motion for appointment of counsel to the Ohio Supreme Court with the Court of Appeals on November 2, 1990, which the court denied on January 8, 1991. (App. to Return of Writ, vol. 7, 2.) Attorney Oliver filed a motion for reconsideration on Hutton's behalf on January 28, 1991, which the court denied on February 1, 1991. (*Id.* at 31, 594 N.E.2d 692.) Attorney Oliver died on August 21, 1991. *See Hutton,* 100 Ohio St.3d at 180, 797 N.E.2d at 955. The Court of Appeals granted a second motion for appointment of counsel to the Ohio Supreme Court on February 12, 1992, and appointed Attorneys David Doughten and Hyman Friedman. (*Id.* at 32, 797 N.E.2d 948.) Hutton, however, did not file a timely appeal of the Court of Appeals' judgment to the Ohio Supreme Court.

Since no appeal had been filed, no further action occurred until July 17, 1996, when the Ohio Supreme Court granted the State's motion to set an execution date of September 22, 1996, and denied Hutton's motion to continue the stay. *State v. Hutton,* 76 Ohio St.3d 1421, 667 N.E.2d 24 (Ohio 1996). On September 19, 1996, the court stayed the execution pending completion of post-conviction proceedings. *State v. Hutton,* 76 Ohio St.3d 1480, 669 N.E.2d 861 (Ohio 1996).

Hutton appealed the Court of Appeals' 1991 decision on remand from the Ohio Supreme Court on August 24, 2000, simultaneously filing a motion for delayed appeal. (App. to Return of Writ, vol. 10, 4, 7.) On October 18, 2000, the court granted Hutton's motion for a delayed appeal. *State v. Hutton,* 90 Ohio St.3d 1441, 736 N.E.2d 903 (Ohio 2000). Hutton asserted the following propositions of law:

> I. When appellate counsel fails to raise several meritorious issues on appeal, so that the issues are deemed waived by review courts, then appellate counsel was ineffective in his representation and the defendant's conviction and death sentence must be reversed.
>
> II. When the death sentence imposed on a defendant is unreliable and inappropriate, the imposition of death violates the defendant's constitutional rights.
>
> III. When the death sentence is excessive and disproportionate to the sentences imposed in similar cases, and when it is inappropriate, the death sentence must be vacated and a life sentence imposed.

(App. to Return of Writ, vol. 10, 142.)

*8 On April 21, 1997, Hutton filed in the Court of Appeals an application for reopening of his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B). (App. to Return of Writ, vol. 8, 3.) Hutton was represented by Attorneys James Draper and Robert Ingersoll of the Cuyahoga County Public Defenders Office. He raised the following claims for relief:

> 1. Appellate counsel failed to argue that the jury instructions given in Mr. Hutton's case were infirm, because they defined mitigation factors on which Mr. Hutton had not presented any evidence.
>
> 2. Appellate counsel was ineffective for failing to raise the issue that the trial court did not define aggravating factors for the jury.

> 3. Appellate counsel was ineffective for not arguing trial counsel was ineffective for failing to make proper objections and preserve issues for appellate review.
>
> 4. Appellate counsel was ineffective for failing to raise issues before the Ohio Supreme Court on cross-appeal.

(App. to Return of Writ, vol. 8, 3–18.) The Court denied the application on March 20, 2000. *State v. Hutton,* No. 51704, 2000 WL 301097 (Ohio Ct.App. Mar. 20, 2000).

Hutton appealed the Court of Appeals' ruling to the Ohio Supreme Court, alleging the following proposition of law:

> When appellate counsel fails to raise several meritorious issues on appeal, so that the issues are deemed waived by review courts, then appellate counsel was ineffective in his representation of the defendant and an application to reopen the appeal for ineffective assistance of appellate counsel must be granted.

(App. to Return of Writ, vol. 9, 13.)

The State filed a motion with the Ohio Supreme Court to consolidate Hutton's appeals from the 1991 judgment of the Court of Appeals on remand and the judgment of the Court of Appeals on his application for reopening of his direct appeal, which the Court granted on July 25, 2001. (*Id.* at 197.) The Ohio Supreme Court affirmed both judgments on November 5, 2003. *State v. Hutton,* 100 Ohio St.3d 176, 797 N.E.2d 948 (Ohio 2003).

Hutton filed his first post-conviction petition on September 11, 1996, asserting the following grounds for relief:

> 1. The failure of defense counsel to adequately represent the petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments to the United States Constitution and Article I § 9 of the Ohio Constitution. The petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 10 and 16 of the Ohio Constitution.
>
> 2. The State of Ohio failed to provide exculpatory evidence as required by the due process clause of both the United States and Ohio Constitutions.
>
> *9 3. The trial court erred by allowing into evidence other acts testimony that was not inextricably connected to the offense. This evidence was unfairly prejudicial as the State did not establish substantial proof that the petitioner raped Eileen Sweeney. Although this issue was raised on direct appeal, the fact that the petitioner was subsequently found not guilty of the rape charge was not part of the direct appeal record.

> 4. The judgment and sentence against petitioner are void or voidable because he did not receive the effective assistance of counsel during the penalty phase of his trial. Counsel fell far below a minimum standard of reasonable legal representation by numerous actions and failure to act in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

(App. to Return of Writ, vol. 11, 11.)

Hutton filed an additional petition to vacate on October 22, 1996, asserting the following claims for relief:

> 1. The failure of defense counsel to adequately represent the petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments to the United States Constitution and Article I § 9 of the Ohio Constitution. The petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I § § 10 and 16 of the Ohio Constitution.

2. The State of Ohio failed to provide exculpatory evidence as required by the due process clause of both the United States and Ohio Constitutions.

3. The trial court erred by allowing into evidence other acts testimony that was not inextricably connected to the offense. This evidence was unfairly prejudicial as the State did not establish substantial proof that the petitioner raped Eileen Sweeney. Although this issue was raised on direct appeal, the fact that the petitioner was subsequently found not guilty of the rape charge was not part of the direct appeal record.

4. The judgment and sentence against petitioner are void or voidable because he did not receive the effective assistance of counsel during the penalty phase of his trial. Counsel fell far below a minimum standard of reasonable legal representation by numerous actions and failure to act in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

5. Appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The teaching of *Furman* was that a state may not leave the decision of whether a

> defendant lives or dies to the unfettered discretion of the jury because such a scheme inevitably results in death sentences that are "wantonly and . . . freakishly imposed" and "are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Id.* at 309–10. (Stewart, J., concurring). Therefore, some form of meaningful appellate review is required to assess the sentencer's imposition of the death penalty.
>
> ***10** 6. Petitioner Hutton's convictions and/or sentence are void or voidable because the State of Ohio on appeal failed to prove beyond a reasonable doubt that any constitutional error which occurred during Petitioner's trial did not contribute to the conviction and sentence of the Petitioner.

(App. to Return of Writ, vol. 11, 49–74.) Hutton filed an amended petition for post-conviction relief setting forth these same claims for relief on October 24, 1996. (*Id.* at 121–45, 797 N.E.2d 948.) The trial court dismissed the petition on July 1, 1997. (*Id.* at 211, 797 N.E.2d 948.) The court issued its Findings of Fact and Conclusions of Law on April 6, 1999. (*Id.* at 213–21, 797 N.E.2d 948.)

Hutton appealed the trial court's ruling on his amended petition on April 27, 1999, raising the following assignments of error:

> 1. The trial court erred to the substantial prejudice of the petitioner by summarily dismissing his post-conviction petition without

affording him an evidentiary hearing or allowing discovery.

2. The Appellant was denied effective assistance of counsel in the guilt-innocence determination phase of trial.

3. The failure of the State to provide exculpatory evidence deprived the Appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

4. The trial court erred by allowing into evidence other acts testimony that was not inextricably connected to the offense.

5. Ineffective assistance of counsel at the penalty phase of trial deprived the Appellant of his rights established under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6. The trial court erred by failing to grant the Appellant's motions for discovery, an investigator and expert assistance.

7. Ohio's post-conviction system does not comply with the requirements of due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

8. The Appellant's convictions and/or sentences are void or voidable because the State of Ohio on direct appeal failed to prove beyond a reasonable doubt that any constitutional error which occurred during

> Appellant's trial did not contribute to the conviction and sentence of the Appellant.
>
> 9. The Appellant's sentence is void or voidable under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Appellant's sentence of death is inappropriate and disproportionate to other defendants throughout the State of Ohio similarly charged. Ohio courts do not engage in an effective proportionality review as is required by statute.

(App. to Return of Writ, vol. 12, 21–73.) The Eighth District Court of Appeals affirmed the decision of the trial court on July 15, 2004. *State v. Hutton,* No. 76348, 2004 WL 1575248 (Ohio Ct.App. July 15, 2004).

Hutton timely appealed the Court of Appeals' decision to the Ohio Supreme Court, advancing the following propositions of law:

> *11 1. Where the affidavits provided in Petitioner's Motion to Vacate pursuant to R.C. § 2953.21 establish a meritorious issue, the trial court may not dismiss the petition without an evidentiary hearing.
>
> 2. The failure to properly conduct *voir dire* and to properly investigate a defendant's case constitutes ineffective assistance of counsel where it can be shown that a proper investigation would reasonably have resulted in the defendant's acquittal.
>
> 3. The failure of the State to provide exculpatory evidence deprives a defendant of

his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Testimony alleging an unproven rape allegation may not constitute harmless error, particularly where a defendant is subsequently acquitted of that allegation.

5. Defense counsel's failure to investigate or make any preparation into the penalty phase of a capital trial constitutes the constructive denial of counsel.

6. The trial court must grant reasonable requests for discovery and experts made pursuant to R.C. § 2953.21 where such discovery could reasonably lead to proof of petitioner's actual innocence.

7. A reviewing court may not invoke a harmless error standard where the error is of such a nature that the integrity of the trial is placed into question.

8. The petitioner's sentence is void or voidable under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The petitioner's sentence of death is inappropriate and disproportionate to other defendants throughout the State of Ohio similarly charged. Ohio courts do not engage in an effective proportionality review as is required by statute.

(App. to Return of Writ, vol. 13, 5–22.) The Ohio Supreme Court declined jurisdiction to hear the

appeal on December 15, 2004. *State v. Hutton,* 104 Ohio St.3d 1426, 819 N.E.2d 709 (Ohio 2004).

Hutton filed a second post-conviction petition on February 2, 2001, raising the following claims for relief:

> 1. The failure of defense counsel to adequately represent the petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments to the United States Constitution and Article I § 9 of the Ohio Constitution. The petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 10 and 16 of the Ohio Constitution. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The result of the proceeding was fundamentally unfair or unreliable.
>
> 2. Mr. Hutton's convictions and/or sentences are void or voidable because he is factually and actually innocent of the offense of aggravated murder for which he was convicted and sentenced to death.
>
> ***12** 3. The State failed to provide exculpatory evidence to the petitioner at the time of trial. Cleveland homicide detectives had spoken to Bruce Laster and were aware that he was with

the petitioner on the night of the offense and did not have any knowledge of the petitioner's involvement. In fact, the testimony of Mr. Laster would have directly impeached the testimony of Samuel Simmons Jr. The testimony would have absolved the petitioner of the homicide. The content of Mr. Laster's statement to the homicide detectives was not supplied to the petitioner.

4. The State failed to provide exculpatory evidence to the petitioner at the time of trial. Cleveland homicide detectives had spoken to Bruce Laster and were aware that he was with the petitioner on the night of the offense and did not have any knowledge of the petitioner's involvement. As this failure was not due to simple neglect and appears to have been willful, a lesser standard is required for a reversal. *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

5. The judgment and sentence against Petitioner Hutton are void or voidable because he did not receive the effective assistance of counsel during the penalty phase of his trial. Counsel fell far below a minimum standard of reasonable legal representation by numerous actions and failures to act in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 2, 9, 10 and 16 of the Ohio Constitution.

(App. to Return of Writ, vol. 17, 11–28.) The trial court dismissed Hutton's petition on January 3, 2002. (*Id.* at 259–70, 819 N.E.2d 709.)

Hutton appealed the trial court's dismissal of his second post-conviction petition to the Eighth District Court of Appeals on January 16, 2002. (App. to Return of Writ, vol. 18, 2.) He filed a motion to stay and hold in abeyance the appellate proceedings on February 27, 2002. (*Id.* at 25, 819 N.E.2d 709.) The court granted the motion to stay on March 25, 2002. (*Id.* at 32, 819 N.E.2d 709.) The Eighth District Court of Appeals affirmed the trial court's decision on October 11, 2007. *State v. Hutton*, No. 80763, 2007 WL 2955663 (Ohio App. Oct. 11, 2007).

Attorney Doughten represented Hutton on all of his post-conviction proceedings.

Hutton, again represented by Attorney Doughten, also filed a motion for leave to file a motion for a new trial on February 2, 2001. (*Id.* at 62–109.) Hutton based his request for a new trial upon a recently obtained statement of Bruce Laster, Hutton's co-defendant, which he argued contains exculpatory information that the prosecution suppressed from him at trial in violation of his constitutional rights. (*Id.*) The State filed a motion to dismiss the motion on March 27, 2001. (*Id.* at 113–40.) The motion remains pending.[3]

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[3] Hutton also vigorously opposed the judgment against him for court costs. (*See* ECF No. 64, 31–33.) The Court will not recite the procedural history of that litigation, however, as it presented no issues that are relevant to Hutton's habeas claims.

B. Habeas Proceeding

Hutton filed a Notice of Intention to File a Habeas Corpus Petition on October 11, 2005. (ECF No. 1). Concurrently, he filed a Motion for the Appointment of Counsel and a Motion to Proceed In Forma Pauperis. (ECF No. 3.) The Court granted both motions and appointed David Doughten and John Gibbons to represent Hutton. (ECF No. 4.)

***13** On December 15, 2005, Hutton filed the Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF No. 10.) Respondent filed a Return of Writ on February 13, 2006. (ECF No. 15.) Respondent filed an Amended Answer of Return of Writ on March 13, 2006. (ECF No. 17.) After requesting and receiving two extensions of time, Hutton filed a Traverse on April 11, 2006. (ECF No. 20.) Respondent filed a Response to the Traverse on April 26, 2006. (ECF No. 21.)

Hutton filed a motion for discovery on May 5, 2006. (ECF No. 23.) Respondent opposed that motion on May 18, 2006. (ECF No. 25.) Because Hutton simultaneously was seeking relief in state court on the very issues he wished to obtain discovery here, the Court denied the motion without prejudice on December 29, 2006. (ECF No. 27.) On October 11, 2007, the Court issued an order stating that Hutton would have sixty days after the conclusion of his state-court litigation in which to file a renewed motion for discovery and/or motion for investigator. (ECF No. 33.)

After completing his state-court litigation, Hutton re-filed a motion for discovery on May 19, 2008. (ECF No. 36.) Respondent opposed the motion.

(ECF No. 37.) As part of her opposition to the motion, Respondent argued, as she did in the Return of Writ, that the Petition was filed untimely and should therefore be dismissed. (*Id.*) Therefore, prior to deciding the pending discovery motion, the Court ruled that while it was a close question whether Hutton filed the Petition within the statute-of-limitations period set forth in 28 U.S.C. § 2244(d), he was in any event entitled to equitable tolling of the statute, and his habeas case would continue. (ECF No. 38.) In a separate order, the Court granted Hutton's second discovery motion in part and denied it in part. (ECF No. 39.) Specifically, it permitted Hutton to obtain records from the Bureau of Criminal Investigations and reports pertaining to his trial, and also permitted him to depose his trial counsel. (*Id.*)

Hutton filed a third motion for leave to file additional discovery on April 11, 2009. (ECF No. 43.) Respondent opposed the motion. (ECF No. 44.) Again, the Court granted Hutton's discovery motion in part and denied it in part. (ECF No. 46.) Specifically, the Court allowed Hutton to obtain records and reports from the Cleveland Police Department and St. Luke's Hospital. (*Id.*)

On November 3, 2010, Hutton filed a motion to expand the record. (ECF No. 49.) Respondent opposed the motion. (ECF No. 51.) The Court granted the motion on December 28, 2010. (ECF No. 52.)

Hutton then filed a motion to amend his petition on January 31, 2011. (ECF No. 54.) Respondent opposed the motion on February 9, 2011. (ECF No.

55.) Hutton filed a reply brief on February 22, 2011. (ECF No. 56.) The Court granted Hutton's motion on May 17, 2011. (ECF No. 58.) Hutton filed the Amended Petition on June 20, 2011. (ECF No. 60.)

After requesting and receiving two extensions of time, Respondent filed a Response to Amended Petition. (ECF No. 64.) Hutton requested and received one extension of time, and filed an Amended Traverse on October 18, 2011, rendering the matter ripe for disposition. (ECF No. 66.)

III. Petitioner's Grounds for Relief

*14 Hutton asserts thirteen grounds for relief. The grounds are as follows:

> 1. The failure of defense counsel to adequately represent the petitioner at the culpability phase or guilt-innocence determination phase of trial resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability.
>
> 2. The failure to provide favorable or exculpatory evidence to Hutton before trial was violative of Petitioner Hutton's federal rights.
>
> 3. The sentence against Petitioner Hutton is void or voidable because he did not receive the effective assistance of counsel during the penalty phase of trial.
>
> 4. The evidence is insufficient to sustain the convictions of aggravated murder and kidnapping.

5. The prosecutor's misconduct during the culpability phase of trial denied Petitioner Hutton a fair trial.

6. The trial court erred by allowing into evidence unfairly prejudicial testimony of a rape allegation that did not occur. The Ohio Supreme Court found this to be error, but used an improper standard to determine the error to be harmless.

7. The prosecutor's misconduct during penalty phase closing argument deprived Hutton of a sentencing hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

8. The trial court failed to define the term "aggravating factor" for the jury prior to its deliberations in the penalty phase. Thus, the jury had no guidance in determining the factors to be considered when deciding the appropriateness of the death penalty in this case.

9. The trial court improperly instructed the jury during the penalty phase of trial not to consider any sympathy in its determination of the appropriateness of the death penalty.

10. The trial court improperly dismissed a juror from the penalty phase deliberations and allowed an alternate juror, who had not deliberated in the culpability determination phase, to deliberate as to the appropriate penalty. The trial court also erroneously instructed the alternate juror to adopt the

findings of the remaining jurors, thus depriving Hutton his right to have all jurors make their own individual finding of the appropriateness of the death penalty.

11. Petitioner Hutton was denied effective assistance of appellate counsel.

12. The Ohio courts have not performed any meaningful proportionality review as is required by Ohio's statutory death penalty scheme.

13. The cumulative error in Petitioner Hutton's case denied him a fair trial and penalty phase hearing.

(ECF No. 66, *passim.*)

IV. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), which amended 28 U.S.C. § 2254, was signed into law on April 24, 1996. In *Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), the United States Supreme Court held that the provisions of AEDPA apply to habeas corpus petitions filed after that effective date. *See also Woodford v. Garceau,* 538 U.S. 202, 210, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *Barker v. Yukins,* 199 F.3d 867, 871 (6th Cir.1999) ("It is now well settled that AEDPA applies to all habeas petitions filed on or after its April 24, 1996 effective date."). Because Hutton's petition was filed on December 15, 2005, AEDPA governs this Court's consideration of his petition.

*15 AEDPA was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.' " *Woodford,* 538 U.S. at 206 (quoting *(Michael) Williams v. Taylor,* 529 U.S. 362, 436, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). The requirements of AEDPA "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown,* 551 U.S. 1, 10, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) (citations omitted). Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This legal standard establishes a multi-faceted analysis involving a consideration of both the state court's statement and/or application of federal law and its finding of facts. Habeas courts review the "last *explained* state-court judgment" on the federal claim at issue. *Ylst v. Nunnemaker,* 501

U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (emphasis original).

With respect to § 2254(d)(1), "clearly established federal law" refers to the holdings, as opposed to *dicta*, of the United States Supreme Court's decisions as of the time of the relevant state-court decision. *Williams*, 529 U.S. at 412; *Barnes v. Elo*, 231 F.3d 1025, 1028 (6th Cir.2000). The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are independent tests and must be analyzed separately. *Williams*, 529 U.S. at 412–13; *Hill v. Hofbauer*, 337 F.3d 706, 711 (6th Cir.2003). A state-court decision is "contrary to" federal law only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412–13.

Even if the state court identifies the "correct governing legal principle," a federal habeas court may still grant the petition if the state court makes an "unreasonable application" of "that principle to the facts of the particular state prisoner's case." *Id.* at 413. A state-court decision also involves an unreasonable application if it unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Id.* at 407; *Hill*, 337 F.3d at 711. As the Supreme Court has advised, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was

unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (citing *Williams,* 529 U.S. at 410). The reasonableness of the application of a particular legal principle depends in part on the specificity of the relevant rule. *Yarborough v. Alvarado,* 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). While the application of specific rules may be plainly correct or incorrect, courts may have more leeway in reasonably applying more general rules in the context of a particular case. *Id.*

***16** The Supreme Court interpreted the "unreasonable determination of the facts" clause in § 2254(d)(2) in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In that case, the Court noted that a "clear factual error," such as making factual findings regarding the contents of social service records contrary to "clear and convincing evidence" presented by the defendant, constitutes an "unreasonable determination of the facts in light of the evidence presented." *Id.* at 528–29. In other words, a state court's determination of facts is unreasonable if its findings conflict with clear and convincing evidence to the contrary. This analysis mirrors the "presumption of correctness" afforded factual determinations made by a state court, which can only be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Mitchell v. Mason,* 325 F.3d 732, 737–38 (6th Cir.2003); *Clark v. O'Dea,* 257 F.3d 498, 506 (6th Cir.2001) ("regardless of whether we would reach a different conclusion were we reviewing the case *de novo,* the findings of the state-court must be upheld unless there is clear and convincing evidence to the

contrary"). This presumption only applies to basic, primary facts, and not to mixed questions of law and fact. *See Mason,* 325 F.3d at 737–38 (holding ineffective assistance of counsel is mixed question of law and fact to which the unreasonable application prong of § 2254(d)(1) applies).

By its express terms, however, § 2254(d)'s constrained standard of review applies only to claims that were adjudicated on the merits in the state-court proceeding. *Cullen v. Pinholster,* —— U.S. ——, ——, 131 S.Ct. 1388, 1401, 179 L.Ed.2d 557 (2011); *Clinkscale v. Carter,* 375 F.3d 430, 436 (6th Cir.2004). When a state court does not assess the merits of a petitioner's habeas claim, the deference due under AEDPA does not apply. In such a case, the habeas court is not limited to deciding whether that court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, but rather conducts a de novo review of the claim. *Morales v. Mitchell,* 507 F.3d 916, 930 (6th Cir.2007) (citations omitted); *Newton v. Million,* 349 F.3d 873, 878 (6th Cir.2003); *Maples v. Stegall,* 340 F.3d 433, 436–37 (6th Cir.2003). If the state court conducts a harmless error analysis but does not indicate whether its finding is based on state or federal constitutional law, however, a habeas court, while conducting an independent review of the facts and applicable law, must nonetheless determine "whether the state-court result is contrary to or unreasonably applies clearly established federal law." *Maldonado v. Wilson,* 416 F.3d 470, 476 (6th Cir.2005) (citing *Harris v. Stovall,* 212 F.3d 940, 943 (6th Cir.2000)).

Further, the Supreme Court repeatedly has emphasized that § 2254(d), as amended by AEDPA, is an intentionally demanding standard. In *Harrington v. Richter*, —— U.S. ——, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's decision," then relief is precluded under AEDPA. *Id.* at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[ ] the reasonableness question as a test of its confidence in the result it would reach under de novo review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 785. Rather, § 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Id.* (internal quotation marks omitted). Thus, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786–87. This is a very high standard, which the Court readily acknowledges: "If this standard is difficult to meet, that is because it is meant to be." *Id.* at 786.

V. Exhaustion and Procedural Default

A. Exhaustion

*17 AEDPA's standard of review applies only to claims that have been properly exhausted before the state courts. Section 2254(b)(1) provides that a

federal court may not award habeas relief to an applicant in state custody "unless it appears that—the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1); *see also Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

Thus, exhaustion is fulfilled once a state supreme court provides a convicted defendant an opportunity to review his or her claims on the merits. *O'Sullivan v. Boerckel,* 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). If under state law there remains a remedy that a petitioner has not yet pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir.1994).[4] Rather than dismiss certain claims the court deems unexhausted, however, a habeas court need not wait for exhaustion if it determines that a return to state court would be futile. *Lott v. Coyle,* 261 F.3d 594, 608 (6th Cir.2001).

In circumstances where the petitioner has failed to present a claim in state court, a habeas court may deem that claim procedurally defaulted because the Ohio state courts would no longer entertain the claim. *Buell,* 274 F.3d at 349. To obtain a merit

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[4] The Court also notes that the *Perry* rule, discussed *infra,* would bar on grounds of *res judicata* an Ohio court from considering any issue that could have been, but was not, raised on direct appeal.

review of the claim, the petitioner must demonstrate cause and prejudice to excuse his failure to raise the claim in state court, or that a miscarriage of justice would occur were the habeas court to refuse to address the claim on its merits. *Seymour v. Walker,* 224 F.3d 542, 550 (6th Cir.2000) (citing *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)).

B. Procedural Default

1. General Law

Even where a state prisoner exhausts available state-court remedies, a federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). To be independent, a state procedural rule and the state courts' application of it "must rely in no part on federal law." *Fautenberry v. Mitchell,* No. C–1–00–332, 2001 WL 1763438, at *24 (S.D.Ohio Dec.26, 2001) (citing *Coleman,* 501 U.S. at 732–33). To be adequate, a state procedural rule must be " 'firmly established and regularly followed' "

by the state courts at the time it was applied. *Beard v. Kindler,* 558 U.S. 53, 130 S.Ct. 612, 618, 175 L.Ed.2d 417 (2009). If a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims. *O'Sullivan v. Boerckel,* 526 U.S. at 848; *Rust v. Zent,* 17 F.3d at 160.

***18** In *Maupin v. Smith,* 785 F.2d 135 (6th Cir.1986), the Sixth Circuit outlined the now familiar test to be followed when the state argues that a habeas claim is defaulted because of a prisoner's failure to observe a state procedural rule. It is:

> First, the federal court must determine whether there is a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction—that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim. Fourth, if the federal court answers the first three questions in the affirmative, it would not review the petitioner's procedurally defaulted claim unless the petitioner can show cause for not following the procedural rule and that failure to review the claim would result in prejudice or a miscarriage of justice.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir.2001) (citing *Maupin*, 785 F.2d at 138) (further citations omitted).

In determining whether the *Maupin* factors are met, the federal court again looks to the last explained state-court judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Combs v. Coyle*, 205 F.3d 269, 275 (6th Cir.2000). If the last state court rendering a reasoned opinion on a federal claim "clearly and expressly states that its judgment rests on a state procedural bar," then the claim is procedurally defaulted and barred from consideration on federal habeas review.[5] *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Conversely, if the last state court to be presented with a particular federal claim reaches the merits of that claim, then the procedural bar is removed and a federal habeas court may consider the merits of the claim in its review. *Ylst*, 501 U .S. at 801.

If the three *Maupin* factors are met, the claim is procedurally defaulted. However, the federal court may excuse the default and consider the claim on the

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[5] An exception to this rule lies where "the later state decision rests upon a prohibition against *further* state review," in which case the decision "neither rests upon procedural default nor lifts a pre-existing procedural default, [and] its effect upon the availability of federal habeas is nil . . . ." *Ylst*, 501 U.S. at 804 n. 3. In that case, habeas courts "look through" that later decision to the prior reasoned state-court judgment. *Id.* at 805 ("state rules against [a] superfluous recourse [of state habeas proceedings] have no bearing upon [a petitioner's] ability to raise the [federal] claim in federal court").

merits if the petitioner demonstrates that (1) there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error, or (2) a fundamental miscarriage of justice would result from a bar on federal habeas review. *Maupin,* 785 F.2d at 138; *Hutchison v. Bell,* 303 F.3d 720, 735 (6th Cir.2002); *Combs,* 205 F.3d at 274–75.

A petitioner can establish cause in two ways. First, a petitioner may "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986); *Mohn v. Bock,* 208 F.Supp.2d 796, 801 (E.D.Mich.2002). Objective impediments include an unavailable claim, or interference by officials that made compliance impracticable. *Murray,* 477 U.S. at 488; *Mohn,* 208 F.Supp.2d at 801. Second, constitutionally ineffective assistance of counsel constitutes cause. *Murray,* 477 U.S. at 488–89; *Rust v. Zent,* 17 F.3d at 161; *Mohn,* 208 F.Supp.2d at 804.

***19** If a petitioner asserts ineffective assistance of counsel as cause for a default, that ineffective-assistance claim must itself be presented to the state courts as an independent claim before it may be used to establish cause. *Murray,* 477 U.S. at 488–89. If the ineffective-assistance claim is not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and can only be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective-assistance claim. *Edwards v. Carpenter,* 529 U.S. 446, 452–53, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir.1995) (quoting *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir.2000).

Because the cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice, the Supreme Court has recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004) (citing *Murray*, 477 U.S. at 495–96). When the Court extended this exception to claims of capital sentencing error, it limited the exception in the capital sentencing context to cases in which the petitioner could show " 'by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.' " *Id.* (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)).

The Court will address the issues of exhaustion and procedural default presented in this case when it reviews Hutton's individual claims.

VI. Analysis of Petitioner's Grounds for Relief

A. *First and Third Grounds for Relief: Ineffective Assistance of Trial Counsel*

For his first and third grounds for relief, Hutton claims that his trial counsel violated his Sixth Amendment right to effective assistance of counsel. Specifically, he complains that counsel:

1. was not qualified to represent a death penalty client;

2. failed to conduct a proper voir dire of prospective jurors;

3. failed to conduct an adequate investigation prior to trial;

4. failed to elicit relevant evidence from witnesses at trial;

5. failed to investigate available mitigation evidence and hire experts;

6. failed to present any mitigation evidence;

7. failed to adequately consult with Hutton about mitigation and to prepare him for his unsworn statement;

8. failed to object to the admission of the pre-sentence investigation report and to the prosecutor reading his arrest record from it;

***20** 9. failed to object to the prosecutor referencing statutory mitigating factors that did not apply;

10. failed to object to certain sentencing jury instructions, including the definition of

aggravating circumstance, the inclusion of statutory mitigating factors that did not apply, and the use of the term "recommend" in the death penalty instruction;

11. failed to object to the trial court's inclusion of a firearms specification in the indictment, which was submitted to the jury; and

12. failed to argue or request a jury instruction regarding residual doubt.

(ECF No. 60, 7–11, 22–27; and ECF No. 66, 5, 7–10, 24–25, 27–30.)

1. Procedural Posture

a. procedural history of Hutton's ineffective assistance claims

Hutton vigorously challenged his trial counsel's performance in the state courts. On direct appeal to the Eighth District Court of Appeals, he raised numerous grounds of ineffective assistance of counsel. They were: failure to file pretrial motions; failure to conduct a proper voir dire examination; failure to move for a mistrial at certain key points during the trial, such as after the introduction of "other acts" evidence, after the admission of prejudicial photographs of the victim, after improper limitations on recross—and redirect examinations, after prosecutorial misconduct, and after a juror was improperly dismissed; failure to move for acquittal regarding the two counts pertaining to Simmons; failure to object to the jury not being sequestered between the guilt and sentencing phases of the trial; failure to present evidence in mitigation; failure to object to the inclusion of firearms specifications;

failure to object when the prosecutor read certain portions of his criminal record to the jury; and failure to object to the trial court's use of the word "recommend" in his jury instructions. (App. to Return of Writ, vol. 3, 60, 62.)

The court of appeals found each of Hutton's ineffective-assistance claims concerning the guilt phase meritless, concluding that "[a]t the guilt phase, counsel conducted the defense in an acceptable manner." *State v. Hutton,* No. 51704, 1988 WL 39276, at ——18–19 (Ohio Ct.App. Apr. 28, 1988). In a split decision, however, the court found reversible error in counsel's failure to object when the prosecutor read Hutton's criminal record from the pre-sentence investigation report ("PSI") during his closing argument in the penalty phase, or, at a minimum, his failure to have Hutton's criminal record excised from the PSI as to arrests that never resulted in convictions. *Id.* at ——29, 38.

The State appealed the appellate court's decision finding ineffective assistance based on trial counsel's reliance on the PSI in the sentencing phase, and the Ohio Supreme Court reversed the court of appeals' decision on that ground. *State v. Hutton,* 53 Ohio St.3d 36, 42–44, 559 N.E.2d 432, 440–42 (Ohio 1990). Hutton cross-appealed the court of appeals' decisions denying four of his ineffective-assistance claims, challenging trial counsel's failure to: investigate and present mitigating evidence; object to the trial court's inclusion of a firearms specification in the indictment; object to the prosecutor reading his juvenile criminal record to the jury during his closing argument; and object to the use of the term "recommend" in the sentencing jury instructions.

(App. to Return of Writ, vol. 6, 335–38.) The court denied each of these claims. *Hutton*, 53 Ohio St.3d at 48–49, 559 N.E.2d at 446.

*21 Hutton then raised numerous ineffective-assistance claims in his first post-conviction petition. He argued that trial counsel: was not qualified to represent a death penalty client; failed to conduct an adequate voir dire; failed to adequately investigate the case, hire an investigator or move to have an investigator appointed, interview witnesses who testified, and call certain witnesses or elicit certain testimony from witnesses; failed to investigate possible mitigating factors, adequately present and/or prepare mitigation witnesses, hire a psychologist to assist in mitigation, and obtain mitigation records; failed to prepare Hutton for his unsworn testimony and adequately consult with him about mitigation; and failed to object to the admission of the PSI. (App. to Return of Writ, vol. 11, 124–29, 131–36.) Hutton submitted thirteen affidavits to support his petition, as well as a journal entry indicating his acquittal of charges related to the alleged rape and kidnapping of Eileen Sweeney, a newspaper article that mentions his assistance in a police homicide investigation, and the appellate-court decision reversing a prior manslaughter conviction. (*Id.* at 146–86, 559 N.E.2d 432.)

The trial court first held that the claims were barred by the doctrine of res judicata. (App. to Return of Writ, vol. 11, 216.) The court went on, however, to review some of the ineffective-assistance claims individually, concluding that Hutton received effective assistance of trial counsel and that Hutton's supporting affidavits were not "quality" evidentiary

documents, but were "specious and totally inadequate to substantiate a substantive ground for relief." (*Id.* at 220, 559 N.E.2d 432.)

The Eighth District Court of Appeals affirmed the trial court's ruling on Hutton's ineffective-assistance claims, specifically citing the basis of its decision as res judicata. *State v. Hutton,* No. 76348, 2004 WL 1575248, at *1 (Ohio Ct.App. July 15, 2004) ("seven [of Hutton's assignments of error, including the denial of the ineffective-assistance claim] are barred by res judicata"). The court did not address the merits of Hutton's ineffective-assistance claims. But the court agreed with the trial court that Hutton's supporting affidavits lacked credibility and held that the trial court properly denied Hutton an evidentiary hearing and discovery on the ground that Hutton failed to "set forth sufficient operative facts to establish substantive grounds for relief" as required under Ohio law. *Id.* at *2. The Ohio Supreme Court declined jurisdiction on appeal. *State v. Hutton,* 104 Ohio St.3d 1426, 819 N.E.2d 709 (Ohio 2004).

Hutton filed a second post-conviction petition, raising ineffective-assistance claims based on counsel's failure to call Bruce Laster as a witness in both the guilt and penalty phases of trial. (App. to Return of Writ, vol. 17, 11–21, 25–27.) The trial court dismissed the petition on its merits. (*Id.* at 259–70, 819 N.E.2d 709.) The Eighth District Court of Appeals affirmed the judgment, but on procedural grounds, finding the petition untimely. *Hutton,* 2007 WL 2955663, at *3.

***22** Hutton's ineffective-assistance claims in his habeas petition are nearly identical to those he

asserted in his first post-conviction petition. He has added, however, three sub-claims that he argued on direct appeal but not on post-conviction: counsel's failure to object to the prosecutor's reference to his criminal record; counsel's failure to object to the trial court's use of the term "recommend" in the death penalty jury instructions; and counsel's failure to object to the trial court's inclusion of a firearms specification in the indictment. He also asserts claims that it appears from the record he did not raise in any state court, complaining about his attorney's failure to: object to the trial court's failure to define aggravating circumstance; object to the prosecutor and trial judge instructing the jury as to statutory mitigating factors that did not apply; and request an instruction on residual doubt. (ECF No. 60, 7–12, 21–27.)

b. *res judicata*

Respondent argues that each of Hutton's ineffective-assistance sub-claims is procedurally defaulted. She contends that two of the sub-claims—those relating to voir dire and counsel's capital trial experience—are "abandoned and procedurally defaulted" because Hutton did not raise them on direct appeal to the Ohio Supreme Court. (ECF No. 64, 45, 47.) The others are barred, she asserts, because Hutton raised them in his first post-conviction petition and the court denied them on the ground of res judicata. (*Id.* at 44–45, 49, 51, 52, 53, 55, 57, 58, 64.) Hutton concedes that the issues he raised on direct appeal to the court of appeals but not to the Ohio Supreme Court concerning ineffective assistance during the guilt phase of trial "have not been exhausted and may ultimately have been

defaulted."[6] (ECF No. 66, 4.) But he counters that the post-conviction court misapplied the res judicata rule to the ineffective-assistance claims he raised on post-conviction, and it therefore does not bar them from habeas review.[7] (*Id.* at 4, 21–24.)

As a preliminary matter, this Court concludes that the ineffective-assistance sub-claims Hutton

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[6] Respondent does not argue that any of Hutton's ineffective-assistance claims are unexhausted. Although the State's failure to raise exhaustion does not invariably waive the defense, *Granberry v. Greer*, 481 U.S. 129, 133–34, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), and this Court has the authority to raise the issue sua sponte, *see, e.g., Brown v. Fauver*, 819 F.2d 395, 398 (3rd Cir.1987), the Court will not engage in a sua sponte analysis of exhaustion where the respondent has failed to raise it. Moreover, AEDPA's § 2254(b)(2) permits courts to deny unexhausted habeas claims on the merits where appropriate. *See* 28 U.S.C. § 2254(b)(2); *Hanna v. Ishee*, 694 F.3d 596, 610 (6th Cir.2012) (denying petitioner's claim on the merits "notwithstanding a failure to exhaust" the claim).

[7] Hutton does not argue that any procedural default of these claims can be excused by a demonstration of cause and prejudice, so the Court will not address that issue either. *See, e.g., Acosta v. Artuz*, 221 F.3d 117, 122 (2nd Cir.2000) ("Generally, courts should not raise *sua sponte* nonjurisdictional defenses not raised by the parties.") (citing *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir.1992) (quoting *United States v. Burke*, 504 U.S. 229, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."))); *Wogenstahl v. Mitchell*, 668 F.3d 307, 342 (6th Cir.2012) ("Wogenstahl does not argue cause to excuse his default. Thus, we conclude that this claim was procedurally defaulted.").

raised to the Ohio Supreme Court are preserved for habeas review *even where* he also raised them on post-conviction and the state court declined to address them on the ground of res judicata. Those sub-claims are: counsel's failure to investigate and present mitigation evidence and counsel's failure to object to the admission of the PSI. Ohio's res judicata rule normally bars a defendant from raising for the first time in post-conviction proceedings a claim that was fully litigated or could have been fully litigated at trial or on direct appeal. *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104, 108–09 (Ohio 1967). However, "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone v. Bell,* 556 U.S. 449, 466, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). *See also Ylst,* 501 U.S. at 804 n. 3 (when a "state decision rests upon a prohibition against *further* state review," the decision "neither rests upon procedural default nor lifts a pre-existing procedural default, [and] its effect upon the availability of federal habeas is nil"). In those cases, habeas courts "look through" the later decision to the prior reasoned state-court judgment. *Id.* at 805.

***23** This Court must next determine whether the ineffective-assistance claims that the post-conviction court found barred based on res judicata, because they were *not* raised on direct appeal to the Ohio Supreme Court *when they could have been,* are procedurally defaulted. Those claims are: counsel's inexperience, counsel's improper voir dire, counsel's failure to investigate and present evidence during

the guilt phase of trial, and counsel's failure to consult with Hutton during mitigation.

Hutton first claims that the Eighth District Court of Appeals did not "clearly state" its basis for applying res judicata, effectively reversing the trial court's finding of procedural default and leaving its merits review intact. (*Id.* at 21.) This argument fails. The Court of Appeals explicitly held that Hutton's post-conviction ineffective-assistance claims were "barred by res judicata" and, therefore, affirmed the trial court's finding of procedural default. *See Frazier v. Huffman,* 343 F.3d 780, 791 (6th Cir.2003) (quoting *Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) ("[A] procedural default does not bar consideration of a federal claim on habeas corpus review unless the last state court rendering a reasoned opinion in the case 'clearly and expressly states that its judgment rests on a state procedural bar.' ")).

Hutton's second argument deserves closer examination. He contends that the state court improperly applied res judicata to these ineffective-assistance claims because they were supported by evidence dehors the record. (ECF No. 66, 4.)

Ohio courts routinely apply the res judicata rule to claims raised in petitions seeking post-conviction relief, since the doctrine prevents post-conviction relief on "any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at trial,* which resulted in that judgment or conviction, *or on an appeal* from that judgment." *State v. Cole,* 2 Ohio St.3d 112, 113, 443 N.E.2d 169, 171 (1982) (emphasis original). There is

an exception to Ohio's res judicata doctrine, however, when a petitioner presents evidence dehors, or outside, the record to support a claim on post-conviction. *See, e.g., State v. Smith,* 17 Ohio St.3d 98, 101, 477 N.E.2d 1128, 1131–32 n. 1 (Ohio 1985); *Perry,* 10 Ohio St.2d at 179, 226 N.E.2d at 107 (if the defendant "had no means of asserting the constitutional claim there asserted until his discovery, after the judgment of conviction, of the factual basis for asserting that claim," then the claim "was not one that could have been raised . . . before the judgment of conviction, and hence could not reasonably be said to have been . . . waived").

The Ohio Supreme Court has cautioned, however, that evidence dehors the record will not overcome the res judicata bar in cases where "the allegations outside the record upon which [a petitioner] relies appear so contrived, when measured against the overwhelming evidence in the record of trial counsel's competence, as to constitute no credible evidence and, thus, to justify the trial court's application of the principles of *res judicata.*" *Cole,* 2 Ohio St.3d at 114, 443 N.E.2d at 171. Accordingly, Ohio courts have limited this "new evidence" exception to evidence that "demonstrate[s] that the petitioner could not have appealed the constitutional claim based upon information in the original record." *State v. Lawson,* 103 Ohio App.3d 307, 315, 659 N.E.2d 362, 367 (Ohio Ct.App.1995). It must be "competent, relevant and material," and meet a "threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the

petitioner's claim beyond mere hypothesis and a desire for further discovery."[8] *Id.* (internal quotation marks and citation omitted).

***24** In line with the "new evidence" exception, the Ohio Supreme Court has held that "[g]enerally, the introduction in a [post-conviction relief] petition of evidence *dehors* the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of *res judicata.*" *Cole,* 2 Ohio St.3d at 114, 443 N.E.2d at 171. Conversely, res judicata is a proper ground for dismissing ineffective-assistance claims raised in post-conviction proceedings when the defendant is represented by new counsel upon direct review, fails to raise the claim on direct review, and such issue "could fairly have been determined without resort to evidence *dehors* the record." *Cole,* 2 Ohio St.3d at 113, 443 N.E.2d at 171.

The Sixth Circuit repeatedly has held that the res judicata doctrine is an adequate and independent state ground to procedurally bar claims asserted in federal habeas actions. *See, e.g., Durr v. Mitchell,* 487 F.3d 423, 432 (6th Cir.2007); *Buell v. Mitchell,* 274 F.3d 337, 349 (6th Cir.2001); *Seymour v. Walker,* 224 F.3d 542, 555 (6th Cir.2000). The court also has held, however, that "an incorrect application of a

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[8] For example, Ohio courts have found the following evidence dehors the record to overcome the res judicata bar: evidence withheld by the state; an affidavit by a witness sworn to after the trial in which the witness states that his testimony at trial was false; and a DNA finding in cases that were heard before the use of DNA evidence. *State v. Jones,* No.2001–A–0072, 2002 WL 31812945, at *3 n. 2 (Ohio Ct.App. Dec. 13, 2002).

state *res judicata* rule does not constitute reliance on an adequate and independent state ground." *See Wogenstahl v. Mitchell,* 668 F.3d 307, 341 (6th Cir.2012) (citing *Durr,* 487 F.3d at 434–35, and *Richey v. Bradshaw,* 498 F.3d 344, 359 (6th Cir.2007) (noting that the court has "declined to observe Ohio's procedural bar and instead [has] proceeded to the merits of an ineffective-assistance claim when we have concluded that Ohio improperly invoked its res judicata rule")).

Hutton points to the Sixth Circuit case *Hill v. Mitchell,* 400 F.3d 308 (6th Cir.2005), for the proposition that "when a habeas petitioner raises a claim in state post-conviction based on evidence outside the record, that claim is *not* procedurally defaulted even if the state post-conviction court finds to the contrary." (ECF No. 66, 21–22.) Indeed, the court held in *Hill* that "ineffective-assistance claims [raised in post-conviction] are not barred by res judicata under Ohio law when evidence outside the direct-appeal record is presented . . . ." *Hill,* 400 F.3d at 314. Since *Hill,* the Sixth Circuit has held in several cases that a petitioner's ineffective-assistance claim was not procedurally defaulted because Ohio's res judicata bar was misapplied to the claim. *See, e.g., Morales v. Mitchell,* 507 F.3d 916, 937 (6th Cir.2007) (finding petitioner's ineffective-assistance claim "relies on evidence outside of the trial record and therefore was not defaulted when he failed to raise it on direct appeal"); *Richey,* 498 F.3d at 359–60; *White v. Mitchell,* 431 F.3d 517, 526–27 (6th Cir.2005); *Greer v. Mitchell,* 264 F.3d 663, 675 (6th Cir.2001) (all holding same).

Hutton, however, oversimplifies and misrepresents *Hill's* holding. In the cases in which the Sixth Circuit has followed *Hill,* the court has made it clear that *Hill* does not circumvent Ohio's res judicata doctrine by permitting habeas courts to reach the merits of any claim dismissed on res judicata grounds just because a petitioner presents some supporting evidence outside the record. Rather, the court disregarded the procedural bar only where the evidence at issue was competent, relevant and material, as the doctrine requires. For example, the evidence at issue in *Hill* was an affidavit from an addiction specialist, who testified during the petitioner's mitigation phase that he had been contacted after the guilt phase of the trial, did not meet the petitioner until the morning he testified, and that, had he evaluated the petitioner earlier, he could have testified specifically about the petitioner and his addiction as opposed to addiction in general. *Hill,* 400 F.3d at 314. In *Greer,* the evidence at issue concerned witnesses who never appeared at trial, as well as the testimony of trial counsel respecting trial strategy, which the court stated was "by definition *dehors* the record." *Greer,* 264 F.3d at 675. In *Richey,* the court observed,

> ***25** [T]he only way that Richey could make out a violation of his constitutional rights was to adduce evidence establishing what his counsel would have learned about the State's arson evidence, had his counsel performed effectively. This necessarily required evidence outside the record, and it is exactly the kind of evidence that Richey submitted with his state post-conviction petition, and further developed

> through discovery in the district court . . . . None of this testimony was available to Richey on direct appeal precisely because, under Ohio law, direct appeals are confined to the trial record. Had Richey asserted his ineffective-assistance-of-counsel claim on direct appeal, then, he would have lost. Without evidence showing what kind of scientific defense a reasonably competent attorney would have mounted, the state court would have had no basis for concluding that Richey's counsel was deficient and that Richey was prejudiced thereby.

Richey, 498 F.3d at 360. *See also White*, 431 F.3d at 527 (noting the similarity of claims and "quality of evidence presented" in that case and in *Hill*, where petitioner submitted affidavits of mitigation experts and two additional experts). *Hill*, therefore, did not create an exception allowing habeas petitioners to bypass Ohio's res judicata doctrine; it merely made explicit that habeas courts will not automatically enforce this procedural bar, but will review the ruling to ensure that it complies with Ohio law.

The Court has thoroughly examined the additional evidence Hutton submitted with his post-conviction petition in support of his ineffective-assistance claims. For the reasons explained more fully below, the Court finds that it would not have materially changed the case that could have been presented on direct appeal. The Ohio court, therefore, properly applied res judicata to the ineffective-assistance claims Hutton raised in his post-conviction petition that could have been raised on direct appeal but were not, and they are

procedurally defaulted. *See Wogenstahl,* 668 F.3d at 342 ("Given the restrictions on the evidence *dehors* the record exception to Ohio's res judicata rule and given that Wogenstahl's [ineffective-assistance] claim regarding mitigation evidence at the state level relied nearly exclusively on evidence from the trial itself, we cannot conclude that the Ohio Court of Appeals improperly applied its *res judicata* rule to this claim.").

c. Hutton's remaining sub-claims

The remaining ineffective-assistance sub-claims that Hutton never raised in state court at all are procedurally defaulted. *O'Sullivan v. Boerckel,* 526 U.S. 838, 847–48, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (holding that a claim procedurally defaulted where the petitioner did not appeal the claim to the state supreme court); *Buell,* 274 F.3d at 349 (where the petitioner has failed to present a claim in state court, a habeas court may deem that claim procedurally defaulted because the Ohio state courts would no longer entertain the claim). They are: failure to object to the trial court's failure to define aggravating circumstance; failure to object to the prosecutor commenting upon, and the trial court instructing the jury as to, statutory mitigating factors that did not apply; and failure to request an instruction on residual doubt. Conversely, the remaining sub-claims that Hutton did raise on direct appeal to the Ohio Supreme Court (but not on post-conviction) are preserved for habeas review. They are: counsel's failure to object to the prosecutor's reference to his criminal record; counsel's failure to object to the trial court's use of the term "recommend" in the death penalty jury instructions;

and counsel's failure to object to the trial court's inclusion of a firearms specification in the indictment.

2. Merits

***26** Even if all of Hutton's claims of ineffective assistance of counsel were ripe for review, they lack merit. To succeed on a claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id* at 687. To determine if counsel's performance was "deficient" pursuant to *Strickland*, a reviewing court must find that the representation fell "below an objective standard of reasonableness." *Id.* at 688. It must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

Second, the petitioner must show that he or she was prejudiced by counsel's errors. To do this, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " *Id.* at 693 (citation omitted). Counsel's errors must be "so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

If a petitioner fails to prove either deficiency or prejudice, his ineffective-assistance claim will fail. *See Lundgren v. Mitchell,* 440 F.3d 754, 770 (6th Cir.2006) (citing *Strickland,* 466 U.S. at 697). The Supreme Court recently explained, "Surmounting *Strickland*' s high bar is never an easy task . . . . An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter,* ——U.S. ——, ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (citations and internal quotation marks omitted).

Thus, as the Supreme Court often has repeated, "[j]udicial scrutiny of a counsel's performance must be highly deferential' " and "every effort [must] be made to eliminate the distorting effects of hindsight . . . ." *Strickland,* 466 U.S. at 689. The Court recently emphasized, "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment,' " recognizing "the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." *Cullen v. Pinholster,* — U.S. ——, —— – ——, 131 S.Ct. 1388, 1406–07, 179 L.Ed.2d 557 (2011) (quoting *Strickland,* 466 U.S. at 689–90).

*27 Under AEDPA, a habeas court is limited to determining whether a state-court decision regarding an ineffective-assistance claim was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); *Mitchell v. Mason*, 325 F.3d 732, 737–38 (6th Cir.2003) (holding ineffective assistance of counsel is mixed question of law and fact to which the unreasonable application prong of § 2254(d)(1) applies). The Supreme Court recently observed that the standards imposed by *Strickland* and § 2254(d) are both "highly deferential," so that in applying them together, "review is 'doubly' so." *Harrington*, 131 S.Ct. at 788. Therefore, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

The trial court on post-conviction was the last state court to provide a reasoned decision on most of Hutton's ineffective-assistance claims. Although the court gave alternative grounds for its ruling, first applying res judicata to the claims and then proceeding to the merits, the claims were "adjudicated on the merits" and therefore must be afforded AEDPA deference under § 2254(d). The Sixth Circuit has held that "as long as the state court put forward a merits-based ground for denying post-conviction relief, its mentioning of procedural default as an alternative or even primary ground for denying relief does not preclude AEDPA deference." *McClellan v. Rapelje*, 703 F.3d 344, 354 (6th Cir.2013) (dissent) (citing *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir.2010), and *Brooks v. Bagley*, 513 F.3d 618, 624–25 (6th Cir.2008) (confirming this

rule and noting that "[a]ll of the circuit courts that have considered th[is] question" have held the same)). In addition, AEDPA deference applies regardless of whether the state court provided little or no reasoning at all for its decision. *Harrington*, 131 S.Ct. at 784. Indeed, a state court need not cite or even be aware of Supreme Court cases under § 2254(d). *Id.* The Court in *Harrington* explained,

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

Id.

In light of this standard, the Court now reviews Hutton's individual grounds for relief.

a. counsel's inexperience

For Hutton's first ineffective-assistance sub-claim, he argues that his trial counsel was not qualified to represent a capital defendant because he had never done so in the past. (ECF No. 60, 7.) The trial court on post-conviction rejected this claim, finding Hutton's counsel's inexperience in capital work "irrelevant in light of the fact that counsel zealously represented his client and gave him more than satisfactory assistance." (App. to Return of Writ, vol. 11, 219.)

*28 In *United States v. Cronic*, 466 U.S. 648, 665, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court held, "The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation." The Court found that the fact that the defendant's attorney in this complex mail fraud case was young, his principal practice was in real estate, and this was his first jury trial, did not provide a basis for finding ineffective assistance of counsel without a showing of actual ineffectiveness. *Id.* Here, Hutton has offered no evidence to prove either his attorney's lack of experience or how that inexperience impacted his trial. Thus, the state court's conclusion that Hutton's counsel's inexperience was not a ground for relief neither contradicts nor unreasonably applies *Strickland*.

b. guilt phase

i. deficient voir dire

Hutton argues for this sub-claim that his trial counsel conducted a deficient *voir dire*. He complains that his counsel did not ask the "majority" of prospective jurors a single question about their views on the death penalty; did not object to the State using peremptory challenges on "at least five" jurors based on their reluctance to implement the death penalty; and did not ask if they could consider mitigating factors. (ECF No. 60, 7–8.) Hutton points to evidence in the record only to support two of these arguments: that counsel did not ask the "majority" of prospective jurors a single question about their views on the death penalty, and that counsel did not object

to the State using peremptory challenges on "at least five" jurors based on their reluctance to implement the death penalty. (ECF No. 60, 7–8.)

Hutton raised this claim on direct appeal, but the Eighth District Court of Appeals did not directly address it. Rather, it generally held that "[a]t the guilt phase, counsel conducted the defense in an acceptable manner." *Hutton*, 1988 WL 39276, at *18. Hutton did not appeal this claim to the Ohio Supreme Court, but raised it in his first post-conviction petition. The trial court did not directly address this sub-claim on the merits either, but concluded that, "looking at the allegations individually, it is clear that trial counsel . . . satisfied all requirements in his representation" and "zealously represented his client . . . ." (App. to Return of Writ, vol. 11, 219.)

This Court does not consider the trial court's conclusion to be contrary to, or an unreasonable application of, *Strickland*. The failure to ask potential jurors life-qualifying questions is not per se ineffective assistance of counsel. In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court held that it was permissible to ask prospective jurors about their views concerning the death penalty during voir dire in capital cases. These "death-qualifying" questions would ensure the impartiality of jurors by allowing the State to properly exercise challenges for cause against potential jurors unwilling to return a capital sentence. *Id.* at 520–23. In *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Supreme Court determined that defense counsel had the same ability to identify those jurors who would

always impose the death penalty. *Morgan* held that "on voir dire the court must, on defendant's request, inquire into the prospective jurors' views on capital punishment," because a prospective juror who would always impose the death penalty must not be empaneled. *Id.* at 726. It declared, "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.* at 729. However, as the Sixth Circuit has explained, "*Morgan* does not mandate that life-qualifying questions be asked of potential jurors in every case. Instead, *Morgan* holds that a defendant has the right to life-qualify his jury upon request." *Stanford v. Parker,* 266 F.3d 442, 454 (6th Cir.2001). Indeed, the Sixth Circuit has observed that "[c]ounsel is accorded particular deference when conducting voir dire. An attorney's actions during voir dire are considered to be matters of trial strategy." *Hughes v. United States,* 258 F.3d 453, 457 (6th Cir.2001).

***29** In this case, Hutton has not set forth any evidence as to what his counsel's strategy was in conducting voir dire.[9] Nevertheless, Hutton's counsel may reasonably have decided not to question prospective jurors regarding the death penalty. The trial court played an active role in the *voir dire.* He interviewed each potential juror individually in his chambers about his or her views on capital punishment, including whether they had "any

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[9] The Court acknowledges that Hutton's trial counsel refused to cooperate with Hutton in post judgment discovery matters. (ECF Nos. 50, 53.)

religious or moral scruples" against the death penalty, whether they could listen to the facts and follow the law if the death penalty was a possible sentence, and whether they could recommend the death penalty if appropriate. (App. to Return of Writ, Trial Tr., vol. 1, 21, 23, 24, 39, 46, 49, 64, 70, 95, 132, 137, 170, 194, 201.) In addition, Hutton's attorney did question some prospective jurors about their ability to examine the facts of the case and apply the law when evaluating the sentence to be imposed. (*Id.* at 43–44, 52–53, 75–76, 129–31, 187–88.) And he objected when the prosecutor excused for cause certain jurors who favored life sentences over the death penalty. (*Id.* at 37–38, 340.)

The Court can only speculate as to Hutton's trial counsel's strategy. But given the trial court's involvement, counsel may have wanted to avoid asking redundant questions, which could annoy the judge and potential jurors. In fact, the judge admonished the prosecutor for doing just that and limited the scope of the parties' follow-up questions. He stated, "There is no need that I see for you to repeat everything the Court has drawn from the juror by way of attitude or tendencies." (*Id.* at 193.) Other possible reasons for counsel's minimal questioning include that he may have been satisfied with the chosen jurors, or he may have been reluctant to draw jurors' attention to the idea of the death penalty. *See Stanford*, 266 F.3d at 454. Hutton has not rebutted the presumption that counsel's performance in this respect was objectively reasonable.

Hutton's claim regarding his counsel's failure to object when the State used its peremptory challenges

on jurors who expressed opposition to the death penalty also fails. The State was well within its right to do so. *Witherspoon* and its progeny restrict only challenges *for cause* based on death-penalty views, not peremptory challenges. *See Hicks v. Collins*, 384 F.3d 204, 224 (6th Cir.2004) ("As long as not based on race or gender, peremptory challenges are proper."); *Dennis v. Mitchell*, 354 F.3d 511, 525 (6th Cir.2003) (upholding peremptory challenges based on opposition to death penalty).

Finally, Hutton's complaint regarding counsel's failure to address mitigating factors with potential jurors also lacks merit. Again, Hutton has presented no evidence regarding his attorney's strategy during voir dire or specifically how he was ineffective in this respect. This Court cannot say that the state court was unreasonable in finding defense counsel's overall performance during voir dire satisfactory.

***30** Moreover, Hutton has not demonstrated the he was prejudiced by his counsel's conduct during voir dire. In fact, Hutton does not address this issue at all. He has not provided any evidence that a different set of jurors would have had a "reasonable probability" of a different result. This claim is meritless.

ii. failure to conduct pretrial investigation or elicit relevant evidence from witnesses

Hutton next complains that his counsel was ineffective because he failed to conduct an adequate pretrial investigation and/or failed to elicit relevant evidence from the witnesses at trial. In particular, he complains that his lawyer did not discover before, or develop at, trial: the encounter Simmons' father,

Samuel Simmons Sr. ("Simmons Sr."), had with three men who were looking for Simmons the night of the shootings; Simmons' and Hutton's characters and their relationship; Simmons' drug use; Simmons' and Mitchell's close friendship; Allen and Mary Pollard's experiences the night of the shooting; Sharon Book's ownership of the sewing machine; Hutton's reputation as a good neighbor; Jackie Clayton's experiences the night of the murder; Eileen Sweeney's reputation as a prostitute; the transcript of Hutton's trial for the alleged kidnapping and rape of Eileen Sweeney; and Hutton's assistance to the police in a homicide investigation. (ECF No. 60, 8–11; ECF No. 66, 7–10.)

As noted above, Hutton raised these claims nearly verbatim in his first post-conviction petition, which he supported with eighteen affidavits of family members and friends. (App. to Return of Writ, vol. 11, at 76–95, 98–109.) The state court did not address the claims individually, but rejected them as a whole. It noted that decisions to call, examine or submit statements from witnesses is "a decision concerning trial strategy." Therefore, it reasoned, the failure to subpoena witnesses "is a decision concerning trial strategy, and absent a showing of prejudice, does not deprive a defendant the effective assistance of counsel." (*Id.* at 219–20.) Furthermore, it added, the court of appeals found that trial counsel "vigorously cross-examined State witnesses . . . . [C]ounsel clearly was not ineffective . . . ." (*Id.* at 220.) Finally, the court determined that Hutton's supporting affidavits were not "quality" evidentiary documents, but were "specious and totally

inadequate to substantiate a substantive ground for relief." (*Id.*)

The Supreme Court has made clear that merely labeling an attorney's decision "trial strategy" does not end the inquiry; the strategic decision itself must be the product of a reasonable investigation. The *Strickland* Court set forth this duty to investigate, explaining:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

***31** *Strickland,* 466 U.S. at 690–91. The Sixth Circuit has found ineffective assistance in numerous cases where counsel failed to conduct an adequate investigation, including interviewing potentially important witnesses, or did not present important testimony or evidence at trial. *See, e.g., Ramonez v. Berghuis,* 490 F.3d 482, 491 (6th Cir.2007) (finding ineffectiveness where counsel decided not to interview three potential witnesses who could have

corroborated defendant's testimony and contradicted complaining witness' testimony); *Towns v. Smith*, 395 F.3d 251 (6th Cir.2005) (finding ineffectiveness where counsel decided not to interview a potentially important witness); *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir.2000) (finding ineffectiveness where counsel failed to investigate adequately his own expert witness, who testified that, despite the defendant's intoxication at the time of the crime, the defendant nevertheless was capable of forming the requisite intent to commit the crimes); *Groseclose v. Bell*, 130 F.3d 1161, 1170 (6th Cir.1997) (finding ineffectiveness where counsel had no strategy and conducted no investigation at all).

Nevertheless, the Supreme Court has stated that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Accordingly, the Sixth Circuit repeatedly has concluded that an attorney's pretrial investigation and decisions in presenting evidence and testimony was reasonable given the circumstances. *See, e.g., Landrum v. Mitchell*, 625 F.3d 905, 921–22 (6th Cir.2010) (finding no ineffective assistance where petitioner failed to show prejudice resulting from trial counsel's failure to conduct proper investigation or interview potential witnesses, and present important lay and expert testimony); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir.1997) (finding no ineffective assistance where

counsel did not call witnesses with credibility and reliability problems).

The post-conviction court's decision rejecting Hutton's guilt-phase investigation claims does not unreasonably apply or contradict this Supreme Court precedent. Indeed, Hutton provides virtually no legal or factual argument explaining how these claims meet the *Strickland* standard, either that counsel was deficient or that Hutton suffered any prejudice from the deficiency. The Court nevertheless will address each of Hutton's sub-claims individually.

a) Simmons Sr.'s encounter with three men looking for Simmons the night of the shootings

For this sub-claim, Hutton argues that his counsel was ineffective because he did not question Simmons Sr. at trial about Simmons Sr.'s claim that three men came to his house the night of the murder looking for his son. (ECF No. 66, 7.) Hutton cites Simmons Sr.'s affidavit, in which he recounts this story and states that he told Detective Moore and Hutton's trial counsel about it.[10] (App. to Return of Writ, vol. 11, 76–77.) Hutton does not, however, explain the relevance of this information, why is was important to his defense, or how his counsel's decision not to use it prejudiced him. This claim fails.

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[10] Although, in a puzzling contradiction, Hutton claims that his counsel did not know this story, but "would have discovered" it had he interviewed Simmons Sr. "properly". (*Id.*)

b) Simmons and Hutton's characters and their relationship

***32** Hutton further complains that his counsel did not investigate or adduce evidence at trial, for impeachment purposes, the contrast between Simmons, who could not read, did not work and "everyone . . . disliked," and Hutton, who was skilled with cars and "adored by everyone," including Simmons' father. (ECF No. 66, 7.) Hutton contends his counsel also did not develop the fact that Hutton was an "older brother" figure to Simmons and tried to help him, but that Simmons was "always jealous of him." (*Id.*) Hutton points to the affidavits of Simmons Sr. and his friend William Moore Jr., who both averred as to Hutton's good character, Simmons' generally bad character and lack of credibility, and the nature of their relationship. (App. to Return of Writ, vol. 11, 76–77, 93–95.)

Many of these facts did come out at trial, however, and additional information would have been cumulative. For example, Simmons admitted at trial that he had a long criminal history and stole cars for a living. (App. to Return of Writ, Trial Tr., vol. 2, 1009.) He also acknowledged that he had known Hutton all of his life, and although they had disagreements, they referred to each other as brothers, and he had often relied on Hutton for help. (*Id.* at 1012–14.) Simmons' father testified that his son was "abusive, completely obnoxious," and that his reputation for truthfulness was "not good." (*Id.* at vol. 3, 1846–47, 1861.) He testified that Hutton, on the other hand, had a "very good" reputation for truthfulness. (*Id.* at 1850.) He also testified that Simmons and Hutton were "good friends." (*Id.* at

1857.) Hutton testified that he was "like an older brother" to Simmons and tried to "keep him out of trouble," although they had their "differences." (*Id.* at vol. 4, 1999–2000.) Hutton's counsel emphasized Simmons' lack of credibility in his closing argument by describing his criminal record and noting that he was a high school "dropout," who "never held an honest job in his life" and had a "lousy" reputation for truthfulness. (*Id.* at 2224–27.) He stated that "[i]t could be that he was jealous that the Defendant was going off to school and trying to make an attempt to do something with his life." (*Id.* at 2249–50.) This claim, too, lacks merit.

c) Simmons' drug use

Hutton contends in this sub-claim that his attorney was ineffective because he also failed to impeach Simmons by revealing at trial Simmons' "drug problems." (ECF No. 66, 8.) Hutton points to several affidavits in which the affiants note Simmons' drug use. (App. to Return of Writ, vol. 11, 76, 84, 88.)

This information also was disclosed to the jury during the trial. Dr. Ungvarsky, the surgical resident who examined Simmons in the emergency room after he was shot, testified at trial that Simmons had scarring over vein sites on his body, indicating intravenous drug use. (App. to Return of Writ, Trial Tr., vol. 3, 1656, 1661.) Hutton's attorney pointed this out in his closing statement as well. (*Id.* at vol. 4, 2226.) This claim also fails.

d) Simmons' and Mitchell's close friendship

*33 Hutton also argues that his counsel should have elicited from witnesses that Simmons and Mitchell were "two peas in a pod," and that Hutton "tried to keep the two apart." (ECF No. 66, 8.) He cites Simmons Sr.'s and his friend John Hill's affidavits for support. (App. to Return of Writ, vol. 11, 77, 83.)

Again, this information came out at Hutton's trial. Simmons testified, "[Mitchell and I] was tight. We hustled together, we scrapped together. We was tight. We was close." (App. to Return of Writ, Trial Tr., vol. 2, 885, 1092, 1231.) Moreover, Hutton does not explain the relevance of this information. This claim is meritless.

e) Mary Pollard's experience the night of the shooting

For Hutton's next sub-claim, he assails his counsel for not eliciting "numerous matters of exculpatory evidence" from Mary Pollard, the next-door neighbor of Hutton's mother and a witness for the prosecution. He argues that trial counsel should have questioned her about whether she and her son were home the night Simmons was shot; whether Simmons asked for Hutton's help; and whether Simmons told Hutton that he had been shot. (ECF No. 60, 10.) Hutton points to Mary Pollard's affidavit, in which she described the events of that night. (App. to Return of Writ, vol. 11, 85.)

In fact, Mary Pollard testified about each of these facts at trial. In recounting "everything" she could remember about the night of the murder, she stated that she and her youngest son, Allen, were home that night, when Simmons knocked on her door crying

that he had been shot. (App. to Return of Writ, Trial Tr., vol. 3, 1876.) She stated on cross-examination that her son answered the door, but that she saw what transpired from a window on her stairway that faced the front of the house. (*Id.* at 1885.) She said that Hutton then called for Simmons to come out from the back yard, which Simmons did. She testified that Simmons looked pleased to see Hutton, told Hutton he had been shot, and got in Hutton's car voluntarily. (*Id.* at 1877–78, 1887–89.) Thus, Mary Pollard testified at length as to what she witnessed the night Simmons was shot and was cross-examined by Hutton's defense counsel regarding her story. Her affidavit adds nothing to her testimony. This claim, too, lacks merit.

f) Allen Pollard's experience the night of the shooting

Hutton also complains that his counsel did not interview Allen Pollard, who would have established that Simmons had told Hutton outside his house that he had been shot, asked Hutton to take him to the hospital, and showed no fear of Hutton. (ECF No. 66, 8.) Hutton cites Allen Pollard's affidavit for support. (App. to Return of Writ, vol. 11, 87.) As explained above, Allen Pollard's mother, Mary, covered nearly all of this material during her trial testimony.[11] Allen Pollard's testimony, therefore, would have been cumulative, and this claim fails.

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[11] In fact, neither Mary nor Allen claim that Simmons asked Hutton to take him to the hospital; they claim only that Simmons got in the car with Hutton, and the car drove off.

g) Sharon Book's ownership of the sewing machine

*34 Hutton contends in this sub-claim that his counsel was ineffective for not establishing that the sewing machine at issue in this case belonged to Sharon Book and not to Hutton's sister as "relied upon by the Ohio Supreme Court in upholding the conviction." (ECF No. 66, 8.) But this argument is unpersuasive. Hutton testified that the sewing machine belonged "[t]o the lady upstairs, Sharon Book." (App. to Return of Writ, Trial Tr., vol. 4, 1915.) He explained on cross-examination that he met Book when he fixed her car about one and a half years before. (*Id.* at 2002–03.) Hutton's counsel also stated that Hutton did not own the sewing machine in his closing argument. (*Id.* at 2243.) Furthermore, the Ohio Supreme Court did not even state that the sewing machine belonged to Hutton's sister. It stated that the machine belonged to Hutton. *Hutton*, 53 Ohio St.3d at 36, 41, 559 N.E.2d at 436, 439. The only reference the court made to a sister of Hutton's is Simmons' testimony that Hutton accused Mitchell of "breaking in my sister's house." *Id.* at 41, 559 N.E.2d at 439. (*See* App. to Return of Writ, Trial Tr., vol. 2, 960.)[12] Finally, Hutton does not explain why

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(App. Return of Writ, Trial Tr., vol. 3, 1888-89, 1897; App. to Return of Writ, vol. 11, 87.)

[12] Hutton asserts that "[t]here is no evidence in the record other than this testimony that Hutton even had a sister." (ECF No. 66, 17.) But Hutton does indeed have a sister; his older sister, Diane Banks, submitted one of the affidavits in support of Hutton's first post-conviction petition. (App. to Return of Writ, vol. 11, 88.) The sister at issue here also may be Celeste Laster,

this is important, although the Court presumes it is relevant to question why Hutton would hide his money in someone else's sewing machine. This claim fails.

h) Hutton's reputation as a good neighbor

Hutton next claims that his counsel should have established at trial that Hutton was a good neighbor, undermining the prosecution theory that he committed murder to avenge the robberies of a sewing machine and tires and supporting the defense position that Hutton was merely attempting to help his neighbor, as he often had done. (ECF No. 66, 8–9.) Hutton cites the affidavits of family friend Yvonne Lassiter and his sister, Diane Banks. (App. to Return of Writ, vol. 11, 81–82, 88–89.)

In fact, Hutton's counsel tried to elicit this information from Mary Pollard, but was largely unsuccessful. She did testify, however, that Hutton "was well liked in the community." (App. to Return of Writ, Trial Tr., vol. 3, 1590.) She also testified that she had "never known [Hutton] to have been violent towards someone" (*id.* at 1592, 559 N.E.2d 432), although this testimony opened the door on redirect to questioning about Hutton's prior murder charge. (*Id.* at 1589–92, 1598–99, 559 N.E.2d 432.) This claim is meritless.

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co-defendant Bruce Laster's sister and Hutton's fiancé, who was going to live with Hutton in the house from which the sewing machine was stolen. (*Id.*, Trial Tr., vol. 3, 1886.)

i) Jackie Clayton's experiences the night of the murder

For this sub-claim, Hutton argues that his counsel was deficient because he "failed to issue a subpoena" for Jackie Clayton. He claims that she would have testified that Simmons owed a drug dealer money at the time of the murder and that Simmons was jealous of Hutton. (ECF No. 66, 9.) As explained above, there was testimony at the trial concerning both Simmons' drug use and his relationship with Hutton. This claim fails.

j) Eileen Sweeney was a prostitute

Hutton also complains that his counsel should have elicited the fact that Eileen Sweeney was a prostitute. (ECF No. 66, 9.) The only evidence Hutton offers to support this is the statement of his daughter, Pamela Hutton, in her affidavit. (App. to Return of Writ, vol. 11, 101.) Hutton does not explain why this information is relevant. Moreover, Hutton's counsel tried to get this information into the record. He asked Celeste Laster when she testified if she knew what Sweeney did for a living; she said she did, but the prosecution objected when defense counsel asked her what that was, and the court sustained the objection. (App. to Return of Writ, Trial Tr., vol. 3, 1908.) As the trial court undoubtedly recognized, this information is irrelevant. This claim lacks merit.

k) the transcript of Hutton's kidnapping and rape case

***35** Hutton further argues that his trial counsel should have obtained the transcript of his trial for

the kidnapping and rape of Eileen Sweeney, which resulted in an aquittal. (ECF No. 60, 11.) This would have been impossible, however, because the rape trial had not yet occurred. Hutton's murder trial ended in February 1986; his rape trial did not take place until March 1987. (*See* App. to Return of Writ, vol. 11, 96.)

l) Hutton's assistance to the police with two homicide investigations

For his next sub-claim, Hutton contends that his counsel failed to elicit evidence that Hutton assisted the police in two homicide investigations. (ECF No. 60, 11.) Hutton points to his mother's affidavit, in which she mentions this episode. (App. to Return of Writ, vol. 11, 80.) Hutton again does not explain how this evidence would have supported his defense.

However, this evidence did come out at trial. Detective Moore testified on cross-examination that he had known Hutton before his investigation in this case because Hutton had helped him with a previous homicide investigation. (App. to Return of Writ, Trial Tr., vol. 3, 1727–28.) Hutton's counsel also included that fact in his closing argument. (*Id.* at vol. 4, 2204.) This claim also fails.

m) conclusion

Thus, it was not objectively unreasonable for the Ohio state court to hold that the investigation and presentation of evidence by Hutton's attorney did not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. Hutton has not demonstrated either that counsel performed unreasonably in failing either to conduct a sufficient

investigation or to elicit certain testimony or evidence at trial; nor did he show that this aspect of counsel's performance prejudiced him in any way. Most of the testimony and evidence that Hutton claims was omitted through his counsel's neglect was indeed developed at trial and would have been of little value. Other evidence at issue would have been inadmissible on relevancy or other grounds (which was demonstrated when the trial court sustained objections to defense counsel's questioning concerning Sweeney's occupation and Hutton's neighborliness, for example). And some of the evidence simply did not exist. *See Strouth v. Colson*, 680 F.3d 596, 602 (6th Cir.2012) ("It is not easy to satisfy *Strickland* through the failure to impeach prosecution witnesses when the impeachment evidence is weak and cumulative, and the evidence of the defendant's guilt is "overwhelming," all true here.").

c. penalty phase

i. counsel's failure to investigate and present sufficient mitigating evidence

Hutton's strongest ineffective-assistance claim relates to his trial counsel's performance during the penalty phase of his trial. Hutton's mitigation case rested on a residual doubt theory, adduced through Hutton's unsworn testimony,[13] the PSI, and his

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[13] The Ohio court of appeals provided this summary of Hutton's unsworn statement: "(1) [he] was convicted for an incident which occurred one week prior to the alleged murder; (2) there was no truth to the shooting and disappearance of Derek Mitchell; (3)[he] was sorry that Derek Mitchell was dead; (4)[he] possessed no intentions to harm Derek Mitchell; and (5) Eileen

attorney's closing argument. Hutton argues that his attorney presented "[n]o evidence in mitigation" when the following evidence was readily available: Hutton assisted the police in the investigation of two homicides; he acted as a "guardian angel" for his neighborhood, helping children and the elderly; he turned himself in to the police; he was skilled in karate, art and auto repair; he respected education; he abstained from drugs and alcohol; he was well-liked; he went to church; and he had a positive relationship with his daughter. (ECF No. 66, 24, 28–30.) Hutton states that his attorney should have identified and prepared witnesses to testify about this evidence, obtained employment, medical, legal and other agency records, and hired a psychologist for assistance. (*Id.* at 27, 30.)

***36** To support these claims, Hutton again cites the eighteen affidavits of family members and friends submitted to the trial court in his post-conviction proceedings. (App. to Return of Writ, vol. 11, at 76–95, 98–109.) He also points to a 1987 Cuyahoga County Court of Common Pleas journal entry recording his acquittal of the rape and kidnapping of Eileen Sweeney (*id.* at 96); a newspaper article referencing his help to police in a homicide investigation (*id.* at 97); and a 1980 appellate court opinion reversing a prior murder conviction of Hutton (*id.* at 110–18), which he also submitted to the post-conviction court.

Sweeney had lied about her alleged rape." *Hutton*, 72 Ohio App.3d at 352, 594 N.E.2d at 695.

The trial court denied Hutton's post-conviction ineffective-assistance claim on this ground. It first observed,

> As the Appellate Court noted, trial counsel acted as a zealous advocate in his presentation of mitigating evidence.
>
> Trial counsel re-emphasized to the jury at the sentencing phase petitioner's unsworn statement of innocence, he spoke of a psychiatric report, reminded the jury of petitioner's reversal of his voluntary manslaughter conviction, and "excused away" his juvenile record . . . . Therefore, trial counsel was not ineffective in his assistance to petitioner.

(*Id.* at 219.) The court further noted, in conjunction with Hutton's guilt-phase investigation claim, that decisions to call, examine or submit statements from witnesses is "a decision concerning trial strategy." The failure to subpoena witnesses, therefore, "is a decision concerning trial strategy, and absent a showing of prejudice, does not deprive a defendant the effective assistance of counsel." (*Id.* at 219–20.) Furthermore, it added, the court of appeals found that trial counsel "vigorously cross-examined State witnesses . . . . [C]ounsel clearly was not ineffective . . . ." (*Id.* at 220.) Finally, the court determined that Hutton's supporting affidavits were not "quality" evidentiary documents, but were "specious and totally inadequate to substantiate a substantive ground for relief." (*Id.*)

The Supreme Court repeatedly has held that counsel in a capital case have an "obligation to

conduct a thorough investigation of the defendant's background" for mitigation purposes. *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Strickland*, the Supreme Court noted that a capital sentencing proceeding "is sufficiently like a trial in its adversarial format and in the existence of standards for decision" that counsel's role in the two proceedings is comparable: "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland*, 466 U.S. at 686.

Accordingly, the Supreme Court and Sixth Circuit have found ineffective assistance of counsel in capital cases where trial counsel failed to investigate or present mitigating evidence at sentencing. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (petitioner had an "excruciating life history," yet counsel focused exclusively on his direct responsibility for murder); *Rompilla*, 545 U.S. at 389–93 (counsel ineffective where he failed to examine court file of defendant's prior conviction which contained a range of vital mitigation leads regarding defendant's childhood and mental health problems); *Frazier v. Huffman*, 343 F.3d 780, 795–99 (6th Cir.2003) (counsel ineffective where he failed to introduce any mitigating evidence in either guilt or penalty phases of trial and he was aware of petitioner's brain injury).

***37** Nevertheless, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 383. *See, e.g., Wiggins*, 539

U.S. at 525 (further investigation excusable where counsel has evidence suggesting it would be fruitless); *Strickland,* 466 U.S. at 699 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (finding limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). The Supreme Court has advised, "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691.

The issue for this Court, therefore, is whether, in applying § 2254(d)(1), the Ohio court was unreasonable in concluding: (1) that Hutton had not overcome the strong presumption of competence by proving his counsel's deficient performance in his preparation for and presentation during the sentencing phase of the trial; and (2) that Hutton had failed to demonstrate a reasonable probability that a jury presented with this additional mitigating evidence would have imposed a different sentence sufficient to undermine confidence in the outcome. *See Pinholster,* 131 S.Ct. at 1403.

The Court finds that the state court was not unreasonable in denying Hutton's claims related to his counsel's performance in preparing for and presenting evidence during the penalty phase of his trial. First, contrary to Hutton's assertion, his trial counsel did present relevant mitigating evidence to the jury. As the post-conviction court noted, "Trial

counsel re-emphasized to the jury at the sentencing phase petitioner's unsworn statement of innocence, he spoke of a psychiatric report, reminded the jury of petitioner's reversal of his voluntary manslaughter conviction, and 'excused away' his juvenile record." (App. to Return of Writ, vol. 11, 219.) Moreover, much of the evidence Hutton claims would have assisted him in mitigation was introduced during the guilt phase of the trial. There was testimony, for example, about Hutton's assistance to police during a homicide investigation (App. to Return of Writ, Trial Tr., vol. 3, 1727–28); his voluntary surrender to police (*id.* at vol. 4, 1963–65); his work in auto repair and future business plans (*id.* at vol. 3, 1592, 1868; vol. 4,1928–29, 1986–87); his karate training (*id.* at 1912–13); his commitment to education (*id.* at 1912–13, 1929, 1958–59, 1979, 2077); his abstinence from alcohol (*id.* at 2077); and his reputation for honesty and helpfulness (*id.* at vol. 3, 1590–91, 1850–51). The PSI also contained information regarding Hutton's family background and character. (*Id.* at vol. 4, Ct. Ex. B.)

***38** The Ohio Supreme Court also noted, in finding no error in the prosecution's "potentially prejudicial" comments regarding Hutton's prior criminal record, that "the evidence in mitigation was meager, consisting mainly of Hutton's protestations of innocence. The PSI also mentioned that Hutton's father had died and that his stepfather abandoned his family when Hutton was a child." *Hutton,* 53 Ohio St.3d at 44, 559 N.E.2d at 442. And the court later summarized the mitigating evidence in the record in its review of Hutton's sentence, finding:

History, character and background: Hutton was born on October 28, 1953. The presentence investigation report shows that his father died in 1963, when Hutton was still a child. Although it is not clear whether Hutton's mother and father were ever divorced, Hutton's mother remarried in 1960. However, her second husband abandoned the family in 1965. Hutton was self-employed as an automotive mechanic. Before he surrendered to Detective Moore, he was taking courses in that field at Lincoln Technical Institute. He testified in the guilt phase that he had also been employed as a security guard and had completed a six-week, 120–hour course of "security [and] private police training" at Case Western Reserve University. He had also been on general relief and food stamps "off and on" since 1981, and he admitted that he had never reported his income from repairing cars to the welfare authorities. There was also guilt-phase testimony about Hutton's good reputation. Samuel Simmons Sr., the father of victim Samuel Simmons Jr., testified in the guilt phase that Hutton had a "very good" reputation for truthfulness. Simmons Sr. also testified that he "would put [his] life in [Hutton's] hands any day." We give some mitigating weight to Hutton's history, character, and background.

Hutton, 100 Ohio St.3d at 189–91, 797 N.E.2d at 963.

Much of the evidence Hutton claims should have been presented to the jury in mitigation, therefore,

would have been cumulative to what already was before it, and the failure to present it does not form the basis of an ineffective-assistance claim. As the Sixth Circuit has observed, "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." *Eley v. Bagley*, 604 F.3d 958, 968 (6th Cir.2010) (quoting *Nields v. Bradshaw*, 482 F.3d 442, 454 (6th Cir.2007)).[14]

Hutton claims that his counsel should have discovered more mitigating evidence, from other family members and friends, medical, legal and school records, and a psychologist. However, Hutton has set forth no evidence that suggests that these witnesses, records or an expert would have helped him in mitigation. Indeed, the likelihood that additional mitigating evidence exists is minimal given that Hutton has had access to these witnesses and records throughout his appeals, but has failed to unearth anything significant enough to submit to a court, including this one.[15] For example, Hutton's

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[14] The Ohio Supreme Court also found Hutton's counsel did in fact investigate mitigating evidence as demonstrated by testimony that was introduced during the guilt phase of his trial as to his intelligence and good character, and that "it [is] a plainly reasonable exercise of professional judgment not to repeat the same testimony in the penalty phase." *Hutton*, 53 Ohio St.3d at 49, 559 N.E.2d at 446.

[15] Although this Court is now limited to the state-court record in its consideration of Hutton's ineffective-assistance claims, *see Pinholster*, 131 S.Ct. at 1398, the Court notes that Hutton never advised it of the existence of relevant mitigating evidence obtained since postconviction proceedings or pursuant to

mother and sister explain in their affidavits that Hutton was hospitalized as a child for two years for a "nervous condition" possibly related to his "very abusive, violent" stepfather. (App. to Return of Writ, vol. 11, 79, 89.) Despite the potentially probative value of this type of evidence, Hutton does not include this episode among the mitigating evidence his counsel missed, much less offer any proof that it actually occurred. Furthermore, the type of mitigating evidence Hutton does offer is "neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make. The jury simply did not need expert testimony to understand the 'humanizing' evidence; it could use its common sense or own sense of mercy." *Wong v. Belmontes,* 558 U.S. 15, 388, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009).

***39** There also is nothing in the record to prove what mitigating evidence Hutton's trial counsel was aware of, the extent of his efforts to prepare for mitigation, or what his strategy was. Aside from the affidavits submitted in post-conviction, which show that Hutton's attorney did not interview certain family members and friends, the Court has " 'no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.' " *Yarborough v. Gentry,* 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (quoting *Massaro v.*

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discovery conducted in this habeas action, nor sought to include such evidence in the record. (*See* ECF Nos. 45, 50, 53, 54.)

United States, 538 U.S. 500, 505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003)).[16]

The Supreme Court in *Strickland* noted that one factor behind a strategic choice not to pursue a line of inquiry could be the defendant himself. It explained,

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

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[16] The Ohio Supreme Court also denied Hutton's claim that his attorney failed to investigate possible mitigating evidence on this ground, observing: "[T]he record does not show what investigations counsel did or did not make. Since it is Hutton's burden to show that his counsel's performance was deficient, his claim lacks merit." *Hutton*, 53 Ohio St.3d at 48–49, 559 N.E.2d at 446.

Strickland, 466 U.S. at 691. Hutton stated in his unsworn statement, "I could have brought people in here to prove that I wasn't [a cut-throat person], but that didn't have nothing to do with the case . . . . I could have did a lot of things that didn't have nothing to do with this particular case, but I didn't due to the fact that I call myself." (App. to Return of Writ, Trial Tr., vol. 4, 2384.) Hutton also did not disclose his psychiatric treatment as a child to the psychiatrist who completed his court-ordered psychiatric evaluation, and he may have chosen not to discuss it with his trial attorney as well. (*Id.* at Ct. Ex. C, 2 ("There is no past history of any mental problems or treatment for any mental illness which was documented or claimed by the defendant.").)

The Supreme Court repeatedly has held that counsel is not ineffective for deciding to offer little or no mitigating evidence where that decision is based on sound professional judgment. *See, e.g., Bell v. Cone,* 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Strickland,* 466 U.S. at 699–700; *Burger,* 483 U.S. at 793–75; *Darden v. Wainwright,* 477 U.S. 168, 184, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). As the Court has explained,

> [T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties . . . . This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained. It is instead a

> case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

*40 *Bobby v. Van Hook,* 558 U.S. 4, 19, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (internal citations omitted).

Thus, Hutton has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 466 U.S. at 689. The Court concludes that the state court was not unreasonable in its finding that Hutton's counsel did not perform below an objective standard of reasonableness in preparing for the penalty phase of trial.

Moreover, even if Hutton could show that his counsel's performed deficiently by not uncovering more mitigating evidence, he suffered no prejudice as a result. Hutton cannot show "a reasonable probability that, absent the errors, the sentence . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695. There must be a "reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537.

The mitigating evidence adduced at trial, described above, was weak. Moreover, the affidavits submitted on post-conviction by the potential witnesses demonstrate that their testimony would have added little of value. The affidavits portray Hutton as a good father, son, brother and neighbor.

They attest to Hutton's honesty, good nature, sobriety, church attendance, hard work, and skill with cars and karate. The state courts that reviewed these affidavits found them to be insubstantial. The post-conviction court stated that they were "specious and totally inadequate to substantiate a substantive ground for relief." (App. to Return of Writ, vol. 11, 220.) The court of appeals agreed, stating that "Hutton submitted thirteen affidavits from family and friends who all claim Hutton is a good man. Several of the affidavits rely on hearsay . . . . None of these affidavits establish a substantive ground for relief." *Hutton,* 2004 WL 157248, at ——2–3. In addition, the Sixth Circuit often has viewed this type of evidence as having little mitigating value. *See, e.g., Moore v. Mitchell,* 708 F.3d 760 (6th Cir.2013) (reversing district court's grant of relief based on ineffective-assistance claim for failure to investigate where "there were no accounts of parental abuse and neglect, no history of witnessing violence, no indication of low intelligence, nor evidence of any of the typical mitigation factors."); *Strouth,* 680 F.3d 596, 604 (6th 2012) (petitioner did not demonstrate the "extreme deprivation or mental and emotional problems" found in cases where ineffective assistance was found). *Cf. Wiggins,* 539 U.S. at 535 (petitioner "suffered physical torment, sexual molestation, and repeated rape" during childhood); *Foust v. Houk,* 655 F.3d 524, 539–44 (6th Cir.2011) (petitioner lived in home with "uninhabitable living conditions," including feces smeared on the wall, vomit on the floor, piles of garbage and dirty laundry stacked throughout the home, and insect and rodent infestation; he and his siblings regularly suffered

brutal beatings; his brothers raped his sisters and threatened them with death); *Sowell v. Anderson,* 663 F.3d 783, 791–93 (6th Cir.2011) (petitioner's infant brother died of starvation; his father repeatedly beat him and sexually molested his sister, threatening to burn her alive if she reported it; he and his siblings were bitten by rats and infected with worms).

***41** Furthermore, while the mitigating evidence Hutton proffers would have contributed little to Hutton's chances of obtaining a life sentence, it may have exposed him to potentially damaging rebuttal and cross-examination. *See, e.g., Strickland,* 466 U.S. at 699 ("Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in."). This risk was realized when the prosecution introduced Hutton's criminal record after Mary Pollard testified about Hutton's non-violent nature. (App. to Return of Writ, Trial Tr., vol. 3, 1587–1601.)

On the other hand, the jury found the murder was conducted with prior calculation and design as well as two statutory aggravating circumstances, course of conduct and felony murder. Even more damaging, the jury heard "the most powerful imaginable aggravating evidence" when they learned that Hutton had already been charged with a murder. *Wong,* 130 S.Ct. at 391 (rejecting petitioner's " 'more-evidence-is-better' approach to mitigation" where it would have opened door to evidence of past murders). The jury also learned that Hutton had been charged

with Eileen Sweeney's rape and had served time in jail for armed robbery.

Thus, it is possible that Hutton's counsel could have conducted a more thorough investigation into, and presentation of, mitigating evidence than he did. Nevertheless, in considering claims of ineffective assistance of counsel, habeas courts "address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronic,* 466 U.S. 648, 665 n. 38, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The totality of mitigating evidence introduced at trial and offered here does not create a reasonable probability of a life sentence when weighed against the aggravating circumstances; and the state court's finding, that Hutton suffered no prejudice from his counsel's performance in the penalty phase of trial, was not objectively unreasonable. This sub-claim, therefore, lacks merit.

ii. counsel's failure to argue residual doubt theory in mitigation or request residual doubt jury instruction

Hutton also complains that his trial counsel failed to present a residual doubt theory to the jury during his closing argument in mitigation and failed to request a residual doubt jury instruction. (ECF Nos. 60, 24; 66, 28.) This Court disagrees.

First, Hutton's counsel did in fact clearly and expressly raise the issue of residual doubt in his penalty-phase closing argument. He argued, for example,

> Our position, the Defendant's position, I guess the best mitigating circumstances that

> anybody could come up with, and that's that in spite of the fact that you all found him guilty . . . but notwithstanding what you have indicated your belief was with respect to the evidence that was presented, what this man is trying to tell you is that he didn't do it. He didn't do it.
>
> *42 In spite of the fact that you have indicated that you are convinced beyond a reasonable doubt that he did, and as the Judge took pains to inform you during the course of time that he was charging the Jury, reasonable doubt does not mean 100 percent certainty. It doesn't, because people are indeed always subject to some forms of doubt, some forms of that.
>
> But what we are trying to tell you is . . . is that in spite of what your opinion with respect to guilt or innocence is, maybe you were wrong. Just maybe you were wrong. Maybe you believe Sam and Sam is lying.

(App. to Return of Writ, Trial Tr., vol. 4, 2402–03.)

As to counsel's failure to request a residual doubt jury instruction, Hutton has not provided any argument whatsoever to show that this claim meets the *Strickland* standard, either that counsel was unconstitutionally deficient or that Hutton suffered any prejudice. This sub-claim, therefore, is waived. *See United States v. Crosgrove,* 637 F.3d 646, 663 (6th Cir.2011) ("Because there is no developed argumentation in these claims, the panel declines to address Cosgrove's general assertions of misconduct in witness questioning and closing statements."); *United States v. Hall,* 549 F.3d 1033, 1042 (6th

Cir.2008) (" '[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.' ") (quoting *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir.2006)).

iii. counsel's failure to object to jury instructions

Hutton also claims that his counsel should have objected to certain jury instructions, including the definition of aggravating circumstance, the inclusion of statutory mitigating factors that did not apply, and the use of the term "recommend" in the death penalty instruction. (ECF No. 60, 11, 27; ECF No. 66, 24.) Each of these claims is meritless.

Regarding counsel's failure to object to the trial court's definition of aggravating circumstance, the Court finds that the trial court did not commit a constitutional error in this regard, and it therefore cannot form the basis of an ineffective-assistance claim. *See infra* Section VI.G. As to counsel's failure to object to the trial court's inclusion of statutory mitigating factors that did not apply, Hutton's only support for this argument is the conclusory statement that "this had the effect of allowing the non-present mitigation factors to be considered as a non-statutory aggravating factor." (ECF No. 66, 27.) Again, Hutton has not provided sufficient argumentation to demonstrate how this claim meets the *Strickland* standard, and this claim is waived.

The Ohio Supreme Court was the last court to address Hutton's claim regarding counsel's failure to object to the trial court's term "recommend" in the death penalty instruction. It found no ineffective

assistance because the trial court gave "a completely correct statement of law." *Hutton,* 53 Ohio St.3d at 49, 559 N.E.2d at 446. Hutton also provides no argument to support this claim, and the Court finds this decision reasonable.

iv. counsel's failure to consult with him about mitigation and prepare him for his unsworn statement

***43** Hutton further complains that his attorney was ineffective for failing to adequately consult with him regarding mitigation and prepare him for his unsworn statement. (ECF No. 60, 26; ECF No. 66, 30.) These claims also are conclusory, lack argumentation, and are waived.

v. counsel's failure to object to the admission of the PSI and to the prosecution's references to the criminal record contained in it

Hutton contends in this sub-claim that his counsel was deficient for failing to object to the PSI's admission and to the prosecution reading his criminal record from it. (ECF No. 60, 26; ECF No. 66, 24.) He argues that "[t]his allowed the jury to consider the invalid prior homicide as a non-statutory aggravating factor," which "was particularly prejudicial as Hutton was charged with a course-of-conduct capital specification." (ECF No. 66, 24.)

Hutton requested the PSI after his conviction. The Ohio Supreme Court explained that the report, prepared by the probation department,

> listed Hutton's criminal charges since 1967 and indicated the disposition of each charge.

> Two of the listed charges resulted in delinquency adjudications and five resulted in criminal convictions. One other charge resulted in probation. Six charges were listed as "Released" or "No disposition." The charges on which Hutton had just been tried were listed as "Pending." A pending rape case against Hutton [involving Eileen Sweeney] was also listed.

Hutton, 53 Ohio St.3d at 42, 559 N.E.2d at 440. The PSI did not indicate that convictions for voluntary manslaughter, felonious assault, and abduction were reversed on appeal. *Id.* at 43, 559 N.E.2d at 441–42. (*See* App. to Return of Writ, Trial Tr., vol. 4, Ct. Ex. B.)

The last state court to address this claim on the merits, the Ohio Supreme Court,[17] held that Hutton's counsel's performance with regard to the PSI was not ineffective. First, the court rejected a *per se* rule that a request for a PSI constitutes ineffective assistance. The court reasoned,

> The record does not show counsel's thought processes, nor does it show a failure to "make reasonable investigations . . . ."
>
> > It may be, for instance, that counsel conducted a diligent investigation, but was simply unable to find substantial

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[17] Hutton raised this sub-claim in his first post-conviction petition, but the court, after finding all of Hutton's ineffective-assistance claims barred by res judicata, did not address it either generally or specifically as it did with other sub-claims.

> mitigating evidence. In such circumstances, an attorney might logically decide to take the chance that a PSI may produce something he had missed, even at the risk of disclosing his client's criminal record. Since the record does not rebut the presumption that counsel performed reasonably, we cannot hold that counsel's mere request for a PSI was ineffective assistance.

Hutton, 53 Ohio St.3d at 42, 559 N.E.2d at 441 (quoting *Strickland*, 466 U.S. at 691). The court next disagreed that Hutton's counsel should have excised Hutton's arrest record from the report. It noted that Ohio's statute governing PSIs and mitigation in capital cases is silent on the issue of arrests and therefore leaves the matter to the discretion of the trial judge. *Id.* at 42–43, 559 N.E.2d at 441. The court added,

> *44 We recently held that the concept of "social history" [referenced in the criminal procedure rule regarding PSIs] is broad enough to include allegations of wrongdoing even though the wrongdoing did not result in criminal charges . . . . [The arrests reported in Hutton's PSI] are part of his "prior criminal record" . . . .
>
> A pre-sentence investigation report in a capital case may include the defendant's arrest record. It follows that counsel's failure to seek its exclusion was not professionally unreasonable.

> *Id.* at 43, 559 N.E.2d 432, 559 N.E.2d at 441. The court also held that the prosecutor reading his juvenile record to the jury was not objectionable, because "the record was part of the PSI, and therefore subject to fair comment by the prosecutor." *Id.* at 49, 559 N.E.2d at 446.

The Ohio Supreme Court's decisions on these ineffective-assistance sub-claims are not contrary to, or an unreasonable interpretation of, *Strickland.* The Ohio Supreme Court held that the PSI was admissible under Ohio law, and its admission or use, therefore, cannot provide the basis for an ineffective-assistance claim. Hutton does not point to any Ohio or federal law to the contrary. The one case he cites, *Zant v. Stephens,* 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), without any discussion, does not help him.

In *Zant,* the Supreme Court reviewed a Georgia jury's death sentence based on a showing of several aggravating circumstances, one of which was that the defendant had "a substantial history of serious assaultive criminal convictions." The Georgia Supreme Court had found that aggravating circumstance impermissibly vague, but upheld the sentence based on the jury's finding of two other, permissible aggravating factors. *Id.* at 866. The Court held that the verdict was adequately supported by the two unchallenged aggravating factors, which fulfilled the constitutional requirement that "an aggravating circumstance genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the

defendant compared to others found guilty of murder." *Id.* at 877–79. It further found that evidence of the defendant's prior convictions was properly adduced at the sentencing hearing and fully subject to explanation by the defendant. *Id.* at 886–87. The Court explained,

> statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

Id. at 878–79 (emphasis original). The Court distinguished the criminal-history circumstance at issue, which was invalid because it was too vague, from aggravating circumstances that are invalid because they "authorize[ ] the jury to draw adverse inferences from conduct that is constitutionally protected"; or attach the "aggravating" label to factors that are constitutionally impermissible or irrelevant, such as race, religion or political affiliation, or to conduct that actually should militate in favor of a lesser sentence, such as mental illness. The application of those types of circumstances might require a jury's death sentence to be set aside if invalidation makes the death penalty arbitrary or capricious. *Id.* at 887–88. In fact, the Court stated,

"Nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination . . . even though the defendant's prior history of noncapital convictions could not *by itself* provide sufficient justification for imposing the death sentence." *Id.* at 888 (emphasis original).

***45** Thus, although *Zant* "left open the possibility that in a weighing State infection of the process with an invalid aggravating factor might require invalidation of the death sentence," *Stringer v. Black*, 503 U.S. 222, 230, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), it made clear that a jury may consider a defendant's prior criminal history once it has identified a valid aggravating factor. In fact, *Zant* established that "once a defendant is found eligible for death based on a constitutionally sufficient narrowing circumstance, the sentencer's discretion is virtually unlimited." *Smith v. Mitchell*, 348 F.3d 177, 210 (6th Cir.2004).

Here, the jury imposed Hutton's death sentence on two valid aggravating circumstances under Ohio law, prior calculation and design and felony murder. Ohio Rev.Code §§ 2929.04(A)(5), (7). The jury's sentence, therefore, was based on "constitutionally sufficient narrowing circumstances," and the evidence of his criminal record contained in the PSI was properly before them to consider. It follows, then, that the failure to object to the report's admission and to the prosecution's references to it does not constitute ineffective assistance of counsel.

vi. counsel's failure to object to prosecution references to statutory mitigating factors that do not apply

Hutton argues for his next sub-claim that his trial counsel was ineffective for failing to object to prosecution references to statutory mitigating factors that do not apply. (ECF No. 60, 27.) The Court rejects this claim for the same reason it rejects Hutton's claim that counsel should have objected to the court's jury instruction that improperly included statutory mitigating factors that did not apply. *See supra* Section VI.A.2.c.iii.

vii. counsel's failure to object to the trial court's inclusion of a firearms specification in the indictment

Hutton finally contends that counsel failed to object to the trial court's inclusion of a firearms specification in the indictment, which was submitted to the jury. His sole reasoning for this claim is that "[t]his inclusion was especially damaging . . . because the jury was not informed which of the specifications could be considered in the sentencing weighing process." (ECF No. 66, 27.) The Ohio Supreme Court correctly and reasonably denied this claim on the ground that the jury was not instructed that the firearm specification was an aggravating circumstance. *Hutton,* 53 Ohio St.3d at 49, 559 N.E.2d at 446. This claim lacks merit.

d. conclusion

Thus, this Court finds that the state courts reasonably determined that Hutton's trial counsel did not perform so deficiently that there was a

reasonable probability that the jury would have returned a different verdict or would have imposed a different sentence.

B. *Eleventh Ground for Relief: Ineffective Assistance of Appellate Counsel*

Hutton argues in his eleventh ground for relief that his appellate counsel also failed to provide constitutionally effective assistance of counsel. He claims that his counsel failed to raise three meritorious issues in his first direct appeal to the Eighth District Court of Appeals. They are: the trial court improperly instructed jurors about, and the prosecution improperly commented on, mitigating factors that did not apply; ineffective assistance of trial counsel for failure to object to the improper jury instructions and prosecution comments; and ineffective assistance of trial counsel for failure to object to the trial court's failure to define "aggravating" factors. Hutton argues that his appellate counsel also failed to raise certain issues on cross-appeal to the Ohio Supreme Court. Those are: sufficiency of evidence, other acts evidence, improper limitation of cross-examination, prosecutorial misconduct, and ineffective assistance of counsel in the penalty phase. (ECF No. 60, 39–43; ECF No. 66, 79–85.)

1. Procedural Posture

***46** The Ohio Supreme Court accepted these claims for review through Hutton's *Murnahan* motion and reviewed each of them on the merits. *Hutton*, 100 Ohio St.3d at 183, 797 N.E.2d at 957 ("Accordingly, Hutton's claims that he received ineffective assistance in *Hutton I* are not res

judicata, and we proceed to the merits of those claims."). These claims are therefore preserved and ripe for habeas review.

2. Merits

The Court finds, however, that they lack merit. A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The two-part test enunciated in *Strickland* is applicable to claims of ineffective assistance of appellate counsel. Thus, Hutton must demonstrate that appellate counsel's performance was deficient, and that the deficient performance so prejudiced the appeal that the appellate proceedings were unfair and the result unreliable. *Strickland,* 466 U.S. at 687. In reviewing the Ohio Supreme Court's conclusions under § 2254(d)(1), this Court must determine "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington,* 131 S.Ct. at 788. However, an appellant has no constitutional right to have every non-frivolous issue raised on appeal, *Jones v. Barnes,* 463 U.S. 745, 750–54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel, *United States v. Perry,* 908 F.2d 56, 59 (6th Cir.1990). "[O]nly when issues are clearly stronger than those presented, will the presumption of effective assistance of [appellate] counsel be overcome." *Joshua v. DeWitt,* 341 F.3d 430, 441 (6th Cir.2003) (internal quotation marks and citations omitted).

a. trial court's and prosecution's references to mitigating factors that did not apply

Hutton first argues that his appellate counsel failed to raise on direct appeal his claim that the trial court improperly instructed jurors about, and the prosecution improperly commented on, mitigating factors that did not apply. The Ohio Supreme Court addressed this claim, explaining:

> The trial court, in its penalty-phase jury instructions, listed all seven of the statutory mitigating factors in R.C. 2929.04(B), and the prosecutor discussed all seven in his closing argument, even though several were not raised by the defense. Citing *State v. DePew* (1988), 38 Ohio St.3d 275, 289–290, 528 N.E.2d 542, Hutton contends that the trial court and the prosecutor erred in discussing mitigating factors on which Hutton had not presented evidence.
>
> Hutton correctly contends that such comment is inconsistent with *De Pew*. "If the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution. * * *
>
> "[I]t is the defendant who has the right to present and argue the mitigating factors. If he does not do so, no comment on any factors not raised by him is permissible." 38 Ohio St.3d at 289, 528 N.E.2d 542.

> *47 Hutton claims that his appellate counsel rendered ineffective assistance by not raising the *De Pew* issue in the court of appeals.

Hutton, 100 Ohio St.3d at 184, 797 N.E.2d at 957–58. The court denied the claim. First, it noted that the *DePew* case was decided after the court of appeals issued its decision on Hutton's first appeal, and attorneys are not expected "to anticipate a future decision or development in the law." *Id.,* 797 N.E.2d at 958. The court continued,

> Second, Hutton contends that, had counsel raised the *DePew* issue in the court of appeals, this court "would have had to reverse [his] death sentence." On the contrary, we find it unlikely that a *DePew* claim would have succeeded. We have never reversed a death sentence on the ground that the trial court gave the jury an instruction that neutrally listed all statutory mitigating factors, even though the list included factors on which the defense had not presented evidence or argument. Such errors have consistently been held either harmless or not plain error .... Thus, no reasonable likelihood exists that Hutton would have prevailed on the *DePew* issue had his counsel raised it in *Hutton I.*

Id. (citations omitted). The court's determination is not contrary to, or an unreasonable application, of *Strickland.* This claim fails.

b. trial court's failure to define aggravating circumstances

Hutton also complains that his appellate counsel did not raise on direct review a claim challenging the trial court's failure to define aggravating circumstances. As the Ohio Supreme Court explained,

> In the penalty phase, the trial court instructed the jury: "The prosecution has the burden to prove beyond a reasonable doubt that the aggravating circumstances, of which the Defendant was found guilty, outweigh the factors in mitigation * * *." The instructions further told the jury to recommend a death sentence "if you unanimously * * * find proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors." However, the trial court neglected to inform the jury that the term "aggravating circumstances" meant the specifications of which Hutton had been found guilty in the guilt phase. Defense counsel did not object to the instructions.
>
> Hutton's appellate counsel did not raise the issue of the trial court's failure to define "aggravating circumstances."

Id. at 184–85, 797 N.E.2d 948, 797 N.E.2d at 958. The court found this claim lacked merit. It found that because defense counsel did not object to the instructions at trial, any error was waived and the omission could not serve as the basis of reversal absent plain error. Thus, it reasoned, "appellate counsel could reasonably decide not to try to raise it

in the court of appeals," as the issue was not "clearly stronger" than the issues counsel did raise. *Id.* at 185, 797 N.E.2d at 959 (citing *Jones v. Barnes,* 463 U.S. at 750–53; *Smith v. Robbins,* 528 U.S. 529 (2000)).

***48** This Court agrees. Moreover, in *Hoffner v. Bradshaw,* 622 F.3d 487 (6th Cir.2010), the Sixth Circuit affirmed a district court ruling that reached the same result regarding an identical claim, expressly relying on the Ohio Supreme Court's ruling in *Hutton. Id.* at 506. The Sixth Circuit agreed with the *Hutton* decision and added two additional grounds for denying the petitioner's ineffective-assistance-of-appellate-counsel claim. First, it concluded that "the Ohio Supreme Court's reweighing of the mitigating and aggravating factors would effectively cure any error caused by an improper definition of 'aggravating circumstances .' " *Id.* at 506 (citing *Slagle v. Bagley,* 457 F.3d 501, 521 (6th Cir.2006)). *See also Clemons v. Mississippi,* 494 U.S. 738, 748–50, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (finding unconstitutionally overbroad jury instructions at the sentencing stage of capital case harmless error where state appellate court reweighed aggravating and mitigating evidence). And second, the court reasoned that the petitioner could not show that, even if appellate counsel was deficient for not having raised the claim, the result of the trial would have been different. *Hoffner,* 622 F.3d at 506. It held that the trial court's omission was not a "structural" defect under *Arizona v. Fulminante,* 499 U.S. 279, 309–10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), which "affect 'the framework within which the trial proceeds' and are not simply

errors in the trial process itself, . . . such as a faulty jury instruction is." *Id.*

As the Sixth Circuit found in *Hoffner,* the Ohio court's resolution of this claim was not unreasonable, and this claim fails.

c. trial court's failure to object

For this sub-claim, Hutton argues that his appellate counsel should have raised on direct appeal a claim of ineffective assistance of trial counsel for failing to object to the improper jury instructions and prosecution comments described above. The Ohio Supreme Court rejected this claim as well. It found that because *DePew* had not been decided at the time of the trial, counsel could not be expected to object on that ground, and even if counsel had, the claim would not have been successful on appeal. *Hutton,* 100 Ohio St.3d at 186, 797 N.E.2d at 959. As to the failure to object to the trial court's failure to define "aggravating factors," the court concluded that the issue was not " 'clearly stronger' . . . than the issues Hutton's appellate counsel actually did present." *Id.* (citation omitted). Again, the court's finding is not contrary to, or an unreasonable application of, *Strickland,* and this claim is meritless.

d. issues omitted from cross-appeal

Hutton's final sub-claim is that his appellate counsel misread the court of appeals' opinion, in which the three judge panel was split on several issues, and therefore failed to raise certain issues before the Ohio Supreme Court on direct appeal. Those claims are: sufficiency of evidence, other acts evidence, improper limitation of cross-examination,

prosecutorial misconduct, and ineffective assistance of counsel in the penalty phase. (ECF No. 66, 82–85.) The Ohio Supreme Court rejected this claim, ruling,

> ***49** However, Hutton's appeal from the court of appeals to this court was not his first appeal, but his second. "Having no constitutional right to counsel on a second appeal, [Hutton] had no constitutional right to the effective assistance of counsel." *State v. Buell* (1994), 70 Ohio St.3d 1211, 1212, 639 N.E.2d 110.

Hutton, 100 Ohio St.3d at 186, 797 N.E.2d at 959.

Hutton argues that courts have misconstrued *Evitts v. Lucey* to apply only to "first appeals of right," when it should apply to "any appeal of right that is created by the states." (ECF No. 66, 82–83.) Hutton offers no authority to support this proposition, however. The Ohio Supreme Court was correct. The Supreme Court, and lower federal courts, consistently and uniformly have recognized that *Evitts* limits ineffective-assistance-of-counsel claims to "first appeals of right." *See, e.g., Smith v. Robbins,* 528 U.S. 259, 276, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Goeke v. Branch,* 514 U.S. 115, 119, 115 S.Ct. 1275, 131 L.Ed.2d 152 (1995); *Coleman v. Thompson,* 501 U.S. 722, 755–56, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Fautenberry v. Mitchell,* 515 F.3d 614, 642 (6th Cir.2008); *Freels v. Hills,* 843 F.2d 958, 959 (6th Cir.1988). The Ohio Supreme Court's decision, therefore, is neither contrary to, nor an unreasonable application of, clearly established federal law.

e. conclusion

Accordingly, each of Hutton's claims of ineffective assistance of appellate counsel is meritless, and this ground for relief is denied.

C. *Second Ground for Relief: Suppression of Exculpatory Evidence*

For his second ground for relief, Hutton claims that prosecutors violated his constitutional rights when they failed to disclose numerous pieces of exculpatory evidence prior to trial, as required by *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, he alleges that the State failed to disclose six pieces of evidence: inconsistent statements of Bernard Holloway and Simmons; impeaching material about Kim Lampkin; Bruce Laster's statements; and information Simmons Sr. possessed.

1. *Brady v. Maryland* and its progeny

The Supreme Court held in *Brady v. Maryland* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. The Court has explained that this protection "will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Kyles v. Whitley,* 514 U.S. 419, 440, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314

(1935)). As Justice Marshall wrote, "The message of *Brady* and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn,* 476 U.S. 1145, 1148, 106 S.Ct. 2261, 90 L.Ed.2d 706 (1986) (Marshall, J., dissenting).

***50** In order to establish a *Brady* violation, a petitioner must satisfy the following three requirements: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

The Supreme Court has held that *Brady* applies regardless of whether the defendant has expressly requested such evidence. *Strickler,* 527 U.S. at 280. In addition, courts have stressed that the inquiry must be objective, independent of the intent of the prosecutors. *Brady,* 373 U.S. at 87; *Carter v. Bell,* 218 F.3d 581, 601 (6th Cir.2000). Finally, a showing of prejudice need not mean that the evidence would have led to an acquittal, but merely "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles,* 514 U.S. at 433–34.

2. Procedural Posture

Hutton raised the Simmons Sr. sub-claim in his first post-conviction petition. (App. to Return of Writ, vol. 11, 129–30.) The court denied the claim on the basis of res judicata (*id.* at 215–16), and the

Eighth District Court of Appeals affirmed on that ground. *Hutton*, 2004 WL 1575248, at *1. Hutton raised a related but different claim to the Laster sub-claim he now asserts in his second post-conviction petition. (App. to Return of Writ, vol. 17, 22–24.) The court denied the claim because it found the statement was not withheld from the defense. (*Id.* at 266–67.) The Court of Appeals affirmed that decision, but on the ground that the claim was not timely raised. (ECF No. 34–1.) Hutton did not raise the other sub-claims in state court.

Habeas petitioners must surmount several complex procedural hurdles before their *Brady* claims can be considered. First, as explained above, a petitioner cannot obtain federal habeas relief unless he has completely exhausted his available state court remedies to the state's highest court. *Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir.2001); 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ."). However, a habeas court need not wait for a petitioner's claims to be exhausted if it determines that a return to state court would be futile. AEDPA § 2254(b)(1) provides that habeas relief may be granted on an unexhausted claim if "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). Respondent argues only that the Holloway sub-claim is exhausted. (ECF No. 64, 61.) Hutton does not address exhaustion at all.

A second hurdle that Hutton must overcome before his *Brady* claims can be considered is 28 U.S.C. § 2254(e)(2), which generally governs habeas courts' ability to hold evidentiary hearings, but also applies to the introduction of new evidence without an evidentiary hearing, such as when the petitioner seeks to introduce new evidence based on a motion to expand the record. *Holland v. Jackson*, 542 U.S. 649, 653, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004). Many of Hutton's *Brady* claims are based on new evidence, which he moved to have included in the record. (ECF No. 49.) This Court granted the motion, but reserved the right to exclude the evidence from its consideration when reaching the merits of Hutton's claims unless it first determined that Hutton had complied with the standards set forth in § 2254(e)(2). (ECF No. 52.) That Section provides that a habeas court may not expand the record and consider new evidence if a petitioner "failed to develop the factual basis of a claim in state court proceedings" unless the petitioner demonstrates: (1) the claim relies on a new rule of constitutional law made retroactive to him or the factual predicate of the claim could not have been previously discovered through the exercise of due diligence, and (2) the facts underlying the claim establish, by clear and convincing evidence, that, but for the constitutional error, no reasonable jury would have found him guilty. 28 U.S.C. § 2254(e)(2)(A), (B). Neither Hutton nor Respondent even mentions § 2254(e)(2).

***51** Finally, Hutton must demonstrate that his *Brady* claims are not barred from habeas review due to procedural default. Hutton raised only one of his

Brady sub-claims in state court, the Simmons Sr. claim. The remaining sub-claims, therefore, are procedurally defaulted. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Mapes v. Coyle,* 171 F.3d 408, 413 (6th Cir.1999) (all holding that failure to raise a constitutional issue at all on direct appeal constitutes procedural default). The Simmons Sr. sub-claim also is procedurally defaulted, because the post-conviction court found it barred based on res judicata. Respondent argues only that the Holloway sub-claim is procedurally defaulted because it was never raised; she is silent as to the other sub-claims' procedural status. (ECF No. 64, 61.)

To overcome this procedural bar, Hutton must either demonstrate that the state courts misapplied the procedural bar, or show cause and prejudice to excuse the default. Hutton's position on these issues, however, is vague at best. He notes that he raised "the issue" on post-conviction, but does not address the procedural status of his individual sub-claims. (ECF No. 66, 10–11.) He also asserts that "the issue" the post-conviction court found barred by res judicata "could not have been raised on direct appeal," and that the court of appeals was not explicit in its res judicata ruling. (*Id.* at 10.) The Court already has addressed and rejected these arguments. *See supra* Section VI.A. 1.b. Finally, Hutton claims that he "could not have presented" the Holloway sub-claim to state court "as it had not been turned over to the defense." (*Id.*)

The Court need not decide these procedural issues, however, since Hutton's *Brady* claims have no

merit. *See* 28 U.S.C. § 2254(b)(2) (courts may deny unexhausted habeas petitions on the merits); *Lambrix v. Singletary,* 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (courts may skip complicated "procedural-bar issues" if the merits are "easily resolvable against the habeas petitioner"). Moreover, as the Supreme Court has noted, the cause and prejudice necessary to excuse procedural default can "parallel two of the three components of the alleged *Brady* violation itself," suppression and favorability. *Strickler,* 527 U.S. at 282. Because the Court determines that Hutton cannot satisfy these first two prongs of the *Brady* test, it follows that Hutton cannot demonstrate cause and prejudice for procedural default purposes.

3. Suppression and Favorability Analysis

To meet *Brady*'s suppression requirement, the petitioner must show that the evidence was in the prosecution's exclusive control. *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir.1998). A defendant should not be required to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke,* 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Nevertheless, it is the defendant's duty to be vigilant in seeking exculpatory material. There is no *Brady* violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source because in such cases there is really nothing for the government to disclose." *Coe,* 161 F.3d at 344 (internal quotation marks and citations omitted).

***52** Evidence is considered to have exculpatory or impeachment value if it "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S. at 441.

Applying the above Supreme Court precedent, the Court will now address each of Hutton's individual *Brady* claims, analyzing the exculpatory and suppression prongs of *Brady*. The Court addresses the materiality requirement of *Brady*, cumulatively, below. *See id.* at 436 n. 10 ("We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately . . . ."). Because the state courts never adjudicated these claims on the merits, this Court reviews the claims de novo. *See, e.g., Morales v. Mitchell*, 507 F.3d 916, 930 (6th Cir.2007).

a. Bernard Holloway Statements

The first statement at issue is from Bernard Holloway ("Holloway"), who testified at trial that Hutton had told him that Simmons and Mitchell had "hit" a numbers spot and that Sam was shot, implying that Hutton fabricated a story to suggest how Mitchell had died. (ECF No. 66, 12; App. to Return of Writ, Trial Tr ., vol. 3, 1357–58.) Hutton notes, however, that in two prior statements to police (from September 30, 1985, and October 4, 1985), Holloway did not mention Mitchell participating in numbers robberies. Holloway testified at trial that he had spoken to the police, but when defense counsel requested any statements from him from the prosecution, the court told him there was none based

on the prosecution's representation. (App. to Return of Writ, Trial Tr., vol. 3, 1359–60.) Hutton claims that this evidence was suppressed and it is favorable because it supports his argument at trial that Holloway made up the meeting with Hutton. (ECF No. 66, 12.)

Respondent counters that the Holloway statements were not suppressed because the fact that Holloway spoke to police was in the record. (ECF No. 64, 63.) The Court does not agree. Although Hutton's counsel was able to cross-examine Holloway at trial and was aware that Holloway had spoken to police, he could not be expected to elicit from Holloway his exact statements to the police months before the trial. The prosecution represented to the trial court that the State did not possess any statements from Holloway, and that simply was not true. The Supreme Court has noted that "[t]he heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of defense production request . . .," *Moore v. Illinois,* 408 U.S. 786, 794, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972), and "any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense." *Giles v. Maryland,* 386 U.S. 66, 96, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967) (White, J., concurring). The prosecution should have produced Holloway's statements to police when defense counsel requested them. *See, e.g., United States v. Griggs,* 713 F.2d 672, 674 (11th Cir.1983) (noting that "if the arguably exculpatory statements of witnesses discussed *supra* were in the prosecutor's file and not produced, failure

to disclose indicates the 'tip of an iceberg' of evidence that should have been revealed under *Brady*").

***53** The Court does not, however, find that the statements were favorable to Hutton. Hutton could have used Holloway's prior inconsistent statements to impeach his credibility in accurately recounting what Hutton told him shortly after Mitchell disappeared. But the inconsistency does not necessarily prove that Holloway made up the entire story of his meeting with Hutton. The information would not have "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S. at 441.

b. Kimberly Lampkin Statement

The second piece of evidence at issue is a statement police took from Kimberly Lampkin ("Lampkin"), a close friend of Mitchell's and Simmons' and Holloway's roommate at the time of the murder. (ECF No. 66, 14–15.) Lampkin testified at trial that the Saturday before the shooting, she and Mitchell had given a sewing machine to someone. Hutton came to her house the next day and spoke to Mitchell about looking for something. (App. to Return of Writ, Trial Tr., vol. 3, 1429.) Lampkin also testified at trial that Holloway told her that Hutton was looking for her and that after she spoke to Holloway about Hutton she moved, implying that she felt threatened by what she learned about Hutton. (*Id.* at 1398–99.)

According to Hutton, however, Lampkin told police on October 10, 1985, that she knew nothing about the sewing machine Sweeney informed police of, and that she did not even know Laster or Hutton,

but this statement was never disclosed to defense counsel. (ECF No. 66, 14; ECF No. 49–1, 74.) In addition, Hutton claims that in Holloway's two statements to police, discussed above, Holloway did not mention any threat Hutton made concerning Lampkin. (ECF No. 66, 14–15.)

Unlike the Holloway statements discussed above, Hutton does not demonstrate that his counsel ever requested statements of Lampkin from the prosecution. They cannot, therefore, have been suppressed. Moreover, even if Hutton had the statement in his possession at trial, it is not clear that the material would have made his case "markedly stronger." Lampkin's blanket denial of any knowledge pertaining to the case suggests more that she was initially lying to police because she was reluctant to get involved in the investigation, than that she was fabricating her entire testimony at trial.

c. Simmons Statement

Simmons testified at trial that Hutton placed a rifle in his ribs and said, "I don't appreciate you all breaking in my sister's house. Ain't nobody break into my sister's house." (App. to Return of Writ, Trial Tr., vol. 2, 960.) Simmons told police on October 4, 1985, however, that it was Laster who pointed the rifle at him and told him he did not like anyone breaking into his sister's house. (ECF No. 66, 16–17; ECF No. 49–1, 61–63.) Hutton also notes that it is Laster who has a sister, and "[t]here is no evidence in the record other than this testimony that Hutton even had a sister." (ECF No. 66, 17.) Hutton claims that Simmons' statement was suppressed because, although prosecutors gave defense counsel

two written statements of Simmons' at trial, and defense counsel used those statements to show many inconsistencies in Simmons' testimony, defense counsel never mentioned the material inconsistency about who was holding the rifle and who spoke of a sister. (*Id.* at 17; App. to Return of Writ, Trial Tr., vol. 2, 999–1003.) Hutton argues that "[m]inimally, the statement, if believed, would establish that it was Laster and not Hutton who had a motive against Simmons. It also may have been the proverbial straw that broke Simmons [*sic*] back of credibility." (ECF No. 66, 17.)

***54** Hutton has not shown that this statement was either suppressed or favorable. He has not produced any evidence beyond speculation that the prosecution did not produce the statement at issue. This information also is not clearly favorable. Hutton may be correct that the sister referenced here is Celeste Laster, co-defendant Bruce Laster's sister and Hutton's fiancé, who was going to live with Hutton in the house from which the sewing machine was stolen. (*Id.*, App. to Return of Writ, Trial Tr., vol. 3, 1886.) But Hutton apparently forgets that he, too, has a sister. His older sister, Diane Banks, submitted one of the affidavits in support of Hutton's first post-conviction petition. (App. to Return of Writ, vol. 11, 88.)

d. Bruce Laster Statements

Hutton's co-defendant, Bruce Laster, did not testify at Hutton's trial. According to Hutton, Laster entered a guilty plea to involuntary manslaughter as part of a plea bargain two days after the jury rendered its guilty verdict in Hutton's trial. (ECF

No. 66, 18.) Hutton claimed in his second post-conviction petition that, based on an interview that his counsel conducted of Laster, he had evidence that Laster had made a statement to the police, which the police had improperly withheld and which could have been used to impeach Simmons' testimony and "absolve [him] of homicide." (App. to Return of Writ, vol. 17, 22–24.) The trial court denied the *Brady* claim on the ground that Laster's statement was not suppressed. (*Id.* at 267.) The court of appeals affirmed on the ground that the petition was untimely, because Hutton could not prove that the information was previously undiscoverable or that his claim had merit. It explained,

> Hutton, however, has not shown that the State withheld evidence from him. According to Hutton's own petition and according to Laster's interview, Laster refused to cooperate with homicide detectives. Cleveland police reports reveal that Laster refused to provide police with a statement. Based on these factors, the State was not in possession of discoverable evidence.
>
> Hutton also contends Laster's testimony was not available until he agreed to come forward with the evidence and agreed to be interviewed by a private detective hired by Hutton . However, Hutton still waited to file his second petition based on this interview until almost a year and a half after the interview. The interview occurred on September 5, 1999, and Hutton filed his second petition on February 5, 2001.

> There is also evidence that Laster rejected previous attempts by Hutton to obtain his statement. Laster was incarcerated from 1985 until recently, therefore, Hutton was aware of Laster's whereabouts. There is no proof of his unavailability.

(ECF No. 34–1, 5–6.) The court also determined that "[t]he evidentiary value of this interview is negligible."[18] (*Id.* at 7.)

Here, Hutton asserts two, different *Brady* claims based on statements of Laster. First, he points to Laster's statement during the interview that the detectives asked him to provide a statement identifying Hutton as the perpetrator of the Mitchell and Simmons shootings, and he refused because he "[didn't] know if Percy was guilty" and would not "lie and put a man in jail." (App. to Return of Writ, vol. 17, 57.)

***55** Hutton's other *Brady* claim is based not on the Laster interview, but on a police report prepared on October 3, 1985, that does, in fact, summarize a brief oral statement Laster made to police. (ECF No. 66, 17–18; ECF No. 49–1, 58.) Hutton argues that the statement conflicts with Sweeney's story. The report indicates that Laster told police that he, Mitchell and Hutton waited for Sweeney for an hour

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[18] The court found, "A review of Laster's interview reveals that Laster admitted he was drunk the evening of the murders; was asleep in the car during the time the first victim was shot; and was not present when the other victim was shot. He also admitted he does not know what happened that night. Notably, he never stated that Hutton was innocent." (*Id.*)

while she was in the hospital visiting Simmons. He stated Hutton and Mitchell then took him home, and he was not in the car when they picked up Sweeney from the hospital. (ECF No. 66, 17; ECF No. 49–1, 58.) Sweeney, on the other hand, testified that she came back to the car quickly to warn Mitchell but the car was gone, and that Laster and Hutton were in the car when Hutton picked her up from the hospital. (App. to Return of Writ, Trial Tr., vol. 2, 1178.) Hutton asserts that although "[t]he record is not clear if the defense was provided the oral summary for Laster," it must have been suppressed because counsel did not use it to impeach Sweeney. (ECF No. 66, 18.)

The Court finds that these statements also were not suppressed. Hutton had access to Laster and could have obtained this information before trial. Moreover, the Court finds that the value of this information would not have "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense ." *Kyles,* 514 U.S. at 441. The fact that Laster would not sign a statement inculpating Hutton does not prove Hutton is innocent of the crime; it may just mean what Laster said; that he did not know if Hutton committed the crimes or not. Similarly, it is just as likely that the jury would have considered Laster's account of his whereabouts after Mitchell was last seen as self-serving and of little impeachment value.

e. Simmons Sr. Statement

Hutton's final *Brady* sub-claim is based on Simmons Sr.'s claim that three men came to his house the night Simmons was shot looking for his

son. (ECF No. 66, 7, 18.) Hutton cites Simmons Sr.'s affidavit, in which he recounts this story and states that he told Detective Moore and Hutton's trial counsel about it. (App. to Return of Writ, vol. 11, 76–77.) Hutton argues that "this information would have provided evidence that [Simmons] was involved in a drug situation or any other type of situation that may have resulted in violence. It was unquestioned that he and Ricky Mitchell were tight. It should have surprised no one that the two [men] were [targeted] within the same time frame." (ECF No. 66, 18.)

This material also does meet *Brady*' s suppression requirement. Simmons Sr. avers that he told Hutton's attorney this information before trial. Additionally, without any corroborating evidence, the story has minimal exculpatory or impeachment value.

4. Materiality

Even if Hutton satisfied the first two *Brady* prongs, the Court would not find the information at issue material. The Sixth Circuit has noted that "[p]rejudice (or materiality) in the *Brady* context is a difficult test to meet." *Jamison v. Collins,* 291 F.3d 380, 388 (6th Cir.2002). In order to establish prejudice, "the nondisclosure [must be] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler,* 527 U.S. at 281. The *Brady* standard is not met, however, if the petitioner shows merely a reasonable possibility that the suppressed evidence might have produced a different outcome; rather, a reasonable probability is required. *Id.* at

291; *see also Kyles,* 514 U.S. at 434, and *United States v. Agurs,* 427 U.S. 97, 109–10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

***56** The Supreme Court also has recently clarified that reviewing courts must consider the totality of the evidence—and not merely exculpatory facts in isolation—when evaluating a claim of error for its prejudicial effect. In *Wong v. Belmontes,* 558 U.S. 15, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009), the Supreme Court stated:

> In evaluating th[e] question [of prejudice], it is necessary to consider all the relevant evidence that the jury would have had before it if [the defense] had pursued [a] different path—not just the mitigation evidence [the defense] could have presented, but also the [other] evidence that almost certainly would have come in with it.

Id. at 386.

As explained above, the *Brady* material alleged here would have provided minimal value to Hutton. Cumulatively, the materiality of the evidence is even weaker. The Court cannot conclude that even if the evidence at issue were improperly withheld, its "nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler,* 527 U.S. at 281. This claim is not well-taken.

D. *Fifth and Seventh Grounds for Relief: Prosecutorial Misconduct*

For his fifth and seventh grounds for relief, Hutton alleges further prosecutorial misconduct rendered his trial fundamentally unfair, namely, that the prosecution: 1) questioned Mrs. Pollard during redirect examination about Hutton's prior manslaughter charge, among other things; and 2) read Hutton's arrest record to the jury during closing argument in the penalty phase of trial, arguing that Hutton had repeatedly avoided conviction. Hutton objects to the prosecutor specifically listing for the jury, and commenting upon, the thirteen offenses with which Hutton had been charged in the past, when only two of the charges, armed robbery and voluntary manslaughter, resulted in convictions, and the manslaughter conviction was reversed on appeal. (ECF No. 60, 30–35; ECF No. 66, 50, 56–61.) As the Ohio Supreme Court summarized,

> The prosecutor devoted a large part of his [penalty-phase closing] argument to Hutton's criminal record as it appeared in the PSI. He read each item to the jury. Discussing the first two charges on Hutton's record, he said, "Both times he was released. Caught a couple of breaks." Discussing another charge, he said: "Again he gets a release * * *. How many times do they have to pat this guy on the back?"
>
> The prosecutor also said:
>
> "He is found guilty in '78 of voluntary manslaughter, felonious assault, weapons disability and abduction. Sentenced

> again. * * * He appeals the conviction and everything except for the weapons disability charge is reversed by the Court of Appeals and there is no further prosecution. He gets paroled again."

Hutton, 53 Ohio St.3d at 43, 559 N.E.2d at 441.

1. Procedural Posture

Respondent contends that Hutton's prosecutorial-misconduct claims are procedurally defaulted because defense counsel did not object to the complained-of comments. (ECF No. 64, 75–76, 82.) Hutton raised the claims on direct appeal to the Eighth District Court of Appeals. That court agreed with Hutton, holding that the prosecutor's remarks "during trial, closing argument and at the penalty phase greatly harmed the appellant's substantial right to a fair trial," because "it is impermissible to reveal to the jury the existence of offenses for which the defendant has not been convicted." *Hutton*, 1988 WL 39276, at ——27–28.

***57** The Ohio Supreme Court, however, reversed the court of appeals' decision on this claim. Because of defense counsel's failure to object, the court reviewed the claim under a plain error analysis, and found it lacked merit. It agreed with the court of appeals that "the prosecutor erred in telling the jury that the prior convictions had been reversed," because there was no evidence in the PSI or elsewhere in the record of the reversals. *Hutton*, 53 Ohio St.3d at 43, 559 N.E.2d at 442. The court further found that the prosecutor's statements were "potentially prejudicial." *Id.* at 44, 559 N.E.2d 432. It explained,

> By emphasizing the "breaks" Hutton received, the prosecutor apparently sought to suggest that Hutton had committed crimes and gotten away with them. Such argument could have distracted the jury from its proper task: deciding what punishment Hutton deserved for murdering Mitchell. After hearing about the crimes Hutton had supposedly gotten away with, the jury may have wanted to punish him for those crimes as well.

Id. But the court concluded that "[g]iven the sparseness of the mitigating evidence, we cannot say that it is *clear* that the outcome of the penalty phase would have been different but for the unobjected-to statements." *Id.*

Hutton concedes that the claim of prosecutorial misconduct that occurred during the guilt phase of trial is procedurally defaulted, and appears to abandon the claim. (ECF No. 66, 50.) As to his claim regarding the prosecutor's penalty-phase closing argument, Hutton argues that the procedural default is excused by the ineffective assistance of trial counsel in failing to object. (*Id.* at 59, 559 N.E.2d 432.) This Court has found this ineffective-assistance claim meritless, however, *see supra* Section VI.A.2.c.v., and it therefore cannot overcome the bar to Hutton's prosecutorial-misconduct claim. These claims are procedurally defaulted.

2. Merits

Even if Hutton's prosecutorial-misconduct claims were ripe for review, they lack merit. The Supreme Court has held that a prosecutor "may prosecute with earnestness and vigor . . . But, while he may

strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The prosecution, therefore, must avoid insinuations and assertions that are calculated to mislead the jury. *Id.*

To assert a successful claim for prosecutorial misconduct in a habeas proceeding, a prosecutor's conduct must be "so egregious as to render the petitioner's trial fundamentally unfair." *Buell v. Mitchell,* 274 F.3d 337, 364 (6th Cir.2001). It "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); *Durr v. Mitchell,* 487 F.3d 423, 439 (6th Cir.2007). The Sixth Circuit has stressed the narrow scope of a habeas court's review of this due process claim, stating, "We do not possess supervisory powers over state court trials." *Byrd v. Collins,* 209 F.3d 486, 529 (6th Cir.2000). "[I]t is the responsibility of the [state courts] to police their prosecutors; we have no such authority." *Cook v. Bordenkircher,* 602 F.2d 117, 119 n. 5 (6th Cir.1979).

***58** This Court finds that the Ohio Supreme Court's decision rejecting Hutton's prosecutorial-misconduct claims is reasonable. The Court already

has found the admission of the PSI to be permissible, and therefore trial counsel's failure to object to it cannot provide the basis for an ineffective-assistance claim. Likewise, a prosecutor's reference to it cannot form the basis of a prosecutorial-misconduct claim. *See supra* Section VI.A.2.c.v.

E. Fourth Ground for Relief: Sufficiency of the Evidence

Hutton's fourth ground for relief is that there was insufficient evidence to support his convictions for aggravated murder and kidnapping. (ECF No. 60, 27–29; ECF No. 66, 36–49.) Hutton was charged with two counts of aggravated murder. The first count required a finding that Hutton caused Mitchell's death with "prior calculation and design." Ohio Rev.Code § 2903.01(A). The other count required a finding that Hutton committed the murder "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping . . . ." Ohio Rev.Code § 2903.01(B). Both counts included two capital murder specifications: one requiring the jury to find that the murder "was part of a course of conduct" in which Hutton purposely killed Mitchell and also purposely attempted to kill Simmons; the other requiring it to find that Hutton "either . . . was the principal offender in the commission of the aggravated murder, or, if not the principal offender, committed the aggravated murder with prior calculation and design." Ohio Rev.Code § 2929.04(A)(5) and (7), respectively.

Hutton argues that the evidence did not demonstrate his prior calculation and design in

Mitchell's murder or the kidnapping. Specifically, he claims "the state could not establish the time of death, the weapon or weapons used to cause the death, or the circumstances of the death." (ECF No. 66, 45.) He points to the prosecution's lack of "direct witnesses" and its reliance on the "incredulous testimony" of its "sole witness," Simmons. (*Id.* at 39, 44–45.) He also notes the lack of "physical evidence linking [Hutton] to any wrong ~~doing~~ [*sic*] that day," such as a conclusive murder weapon, a report of an attempted robbery of an Eldorado car in the area near Wain Court and East 103rd St. the night Simmons was shot, or even confirmation that the car existed, a report from the person who found Mitchell's body, or any incriminating evidence found in the car Hutton drove that night or in his apartment. (*Id.* at 39.)

1. Procedural Posture

Respondent argues that this claim is procedurally defaulted. (ECF No. 64, 73.) Hutton raised this claim on direct appeal to the Eighth District Court of Appeals when he challenged the trial court's denial of Hutton's motions for acquittal. (App. to Return of Writ, vol. 3, 51–55.) Judge Matia, who wrote the lead opinion for the three judge panel, concluded that the trial court erred in not granting Hutton's motions for acquittal on the charges for the kidnapping and aggravated murder of Mitchell. *Hutton,* 1988 WL 39276, at *12. Judge McManamon concurred with Judge Matia on some grounds, but explicitly disagreed with his decision on the sufficiency of-the-evidence claim. *Id.* at ——39–40. The third judge, Judge Patton, was silent as to this claim in his dissent, but affirmed Hutton's conviction and

sentence. *Id.* at *49. Hutton did not, however, raise this issue on cross-appeal to the Ohio Supreme Court.[19] This claim, therefore, is procedurally defaulted. *O'Sullivan,* 526 U.S. at 847–48.

***59** Hutton asserts that the procedural default of this claim was "forgiven" when the court of appeals granted his *Murnahan* motion, in which he asserted a claim of ineffective assistance of appellate counsel for failing to raise the sufficiency-of-the-evidence claim. (ECF No. 66, 37.) The Sixth Circuit has rejected this argument. It explained in *Lott v. Coyle,* 261 F.3d 594 (6th Cir.2001), "[T]hat a court, in reviewing a claim of ineffective assistance of counsel, looks to the merits of the alleged error for purposes of determining the existence of *Strickland* prejudice is not dispositive of the question whether a procedurally defaulted claim has been resurrected ." *Id.* at 612.

2. Merits

Even if this claim were ripe for review, it is without merit. The Fourteenth Amendment requires the State to prove every element of a crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 315–16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). When reviewing claims of insufficient evidence, habeas courts must determine "whether, after viewing the

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[19] The court noted that Hutton did not appeal this issue. *Hutton,* 53 Ohio St.3d at 44, 559 N.E.2d at 442. Nevertheless, it "conclude[d] that the majority of the court of appeals decided [the claim] correctly in the state's favor, [and its review of the claim] would not affect [the court's] disposition of this appeal in any event." *Id.*

evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis original). "[T]he *Jackson* inquiry does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." *Herrera v. Collins,* 506 U.S. 390, 402, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson,* 443 U.S. at 319.

This Court must limit its review to evidence adduced during trial. *Herrera,* 506 U.S. at 402 (citing *Jackson,* 443 U.S. at 318) ("*Jackson* does not extend to nonrecord evidence, including newly discovered evidence."). And it is applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson,* 443 U.S. at 324 n. 16.

Because both *Jackson* and AEDPA apply to Hutton's sufficiency claim, this Court's review requires deference at two levels. " 'First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the [state court's] consideration of the trier-of-fact's verdict, as dictated by AEPDA.' " *Davis v. Lafler,* 658 F.3d 525, 531 (6th Cir.2011) (quoting *Tucker v. Palmer,* 541 F.3d 652, 656 (6th Cir.2008)). The Sixth Circuit has observed that " '[a] defendant who challenges the sufficiency of the evidence to sustain his conviction faces a nearly insurmountable

hurdle.' " *Id.* at 534 (quoting *United States v. Oros*, 578 F.3d 703, 710 (7th Cir.2009)).

Judge McManamon provided the last reasoned state-court determination of this matter in her concurring opinion for the Eighth District Court of Appeals. She concluded,

> ***60** I believe the state presented sufficient evidence to support both the kidnapping and murder counts. Approximately one week before the evening at issue, Hutton told Mitchell and Simmons he would kill them both if he learned they stole the sewing machine. A jury could reasonably find this motive compelled Hutton to shoot Simmons. The expert ballistics testimony showed it was possible that Mitchell and Simmons were shot with the same gun. Before shooting Simmons, Hutton had held a gun to Mitchell's head when they stopped at the bus lot. Mitchell was last seen alive when he left the hospital with Hutton, who later told Eileen Sweeney that Mitchell "wasn't coming back."
>
> A reviewing court will not reverse a conviction on sufficiency grounds if the evidence would permit reasonable minds to differ as to whether the state proved each element of the offense beyond a reasonable doubt . . . .
>
> The state theorized at trial that Hutton kidnapped Mitchell by deception to facilitate his murder. (Tr. 2142, 2280). See R.C. 2905(A)(2). Conversely, one of Hutton's aggravated murder convictions, charged in the

> second count of the indictment, is felony murder based on the kidnapping.
>
> The evidence reasonably permits a finding of kidnapping by deception. Simmons testified that Hutton told Mitchell on the way to the hospital that someone came out of the house and shot Simmons. (Tr. 973–974). When Mitchell left the hospital with Hutton and Laster, he believed that they were on their way to "get" the person who shot Simmons. (Tr. 974–975). The jury could reasonably have found Hutton instilled Mitchell's belief, and that, consistent with the preceding events that evening, Hutton instead intended to kill him.
>
> In addition to felony murder, Hutton was convicted of aggravated murder, as charged in the first count of the indictment, under a theory of prior calculation and design. See R.C. 2903.01(A). The same evidence outlined above supports a finding that Hutton killed Mitchell with "some kind of studied analysis with its object being the means by which to kill." . . . I would thus affirm the court's ruling under this theory as well.

Hutton, 1988 WL 39276, at *40 (citations omitted).[20]

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[20] Judge Matia, on the other hand, focused on the missing evidence. He opined,

> A review of the case *sub judice* clearly reveals that the evidence at the close of the state's case was entirely lacking in proof, either direct or circumstantial, as to several vital elements of the offenses of aggravated murder as charged in the indictment. Specifically, the record reveals that:

The Ohio Supreme Court, in reviewing Hutton's claim that the trial court committed error by admitting Eileen Sweeney's testimony that Hutton raped her, also found the evidence of Hutton's guilt "overwhelming." *Hutton*, 53 Ohio St.3d at 40–41, 559 N.E.2d at 439–40. The court characterized the evidence supporting Hutton's murder and kidnapping convictions this way:

> The evidence in this case points ineluctably to Hutton as the murderer of Derek Mitchell. Hutton had a strong motive: revenge for the theft of the sewing machine and the money hidden therein. Hutton claimed to have been told by Evans that Mitchell had tried to sell Evans a sewing machine. Hutton accused Mitchell of "breaking in my sister's house." In response to Hutton's demands, Mitchell

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1) there was no evidence before the trial court as to the circumstances, time, or place of Mitchell's death;

2) there was no evidence before the trial court that Mitchell met his death while in the company of the appellant during the morning of September 16, 1985;

3) the coroner could only provide an approximation of the time of Mitchell's death;

4) there was evidence of a vague conditional threat made by the appellant toward Mitchell and the display of a handgun which could have possibly indicated hostility between the appellant and Mitchell; and

5) there was evidence that the appellant made a number of statements to the effect that "Ricky wasn't coming back." However, such statements could hardly be considered as an admission of murder.

Id. at *13, 559 N.E.2d 432.

actually produced a sewing machine, which he turned over to Hutton. Finally, Hutton carried out his threat to shoot Simmons. On this record, it is clear that Hutton believed that Mitchell and Simmons stole his machine.

*61 Hutton attempted to kill Simmons with a .22 caliber revolver. He also had a .22 caliber rifle in his car. Mitchell was killed with a .22 caliber weapon. Expert testimony established that Simmons could have been shot with the same gun. Eileen Sweeney corroborated Simmons's description of Hutton's pistol. Mitchell's corpse was found with a tire lying on it-a significant fact in light of the evidence that Hutton believed that Mitchell had stolen tires from him.

Hutton told Eileen Sweeney that "Ricky wasn't coming back," and she should "forget about him." These statements clearly show that Hutton knew Mitchell was dead. He later informed her that "if * * * [she] told[,] someone would be looking for * * * [her]." This threat indicates consciousness of guilt.

Events confirmed Hutton's statement that Mitchell "wasn't coming back." Eileen Sweeney, Mitchell's alleged common-law wife, never saw Mitchell again after he left her at the hospital. This was unusual, since Sweeney testified that, during their three-year cohabitation, Mitchell "[v]ery seldom" failed to spend the night at their apartment and never left home without telling her.

> The evidence that the murder was committed with prior calculation and design is, if anything, stronger. Mitchell was shot at least twice, once in the head and once in the chest . . . . When this is added to Hutton's repeated threats against Mitchell's life, a rational trier of fact could hardly fail to find prior calculation and design.
>
> Finally, the evidence of kidnapping was overwhelming. Simmons's testimony showed that Hutton shot Simmons and falsely told Mitchell that someone else had done it. At the hospital, Mitchell said, in Hutton's presence, "* * * [W]e going to get the * * * [person] who did this to you." While there is not evidence that Hutton affirmatively caused Mitchell to believe that they were about to hunt down Simmons's fictitious assailant, Hutton knew that Mitchell believed they were. Instead of correcting this belief, Hutton took advantage of it to lead Mitchell to his death. This constituted kidnapping by deception under R.C. 2905.01(A).

Id. at 41, 559 N.E.2d 432, 559 N.E.2d at 439–40 (citations omitted).

Hutton is correct that there was little direct, physical evidence to support his convictions. Nevertheless, courts repeatedly have ruled that "[c]ircumstantial evidence alone, if 'substantial and competent,' may support a verdict and need not 'remove every reasonable hypothesis except that of guilt.' " *United States v. Keeton*, 101 F.3d 48, 52 (6th Cir.1996) (quoting *United States v. Stone*, 748 F.2d

361, 363 (6th Cir.1984)). *See also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction . . . ."); *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954) ("Circumstantial evidence . . . is intrinsically no different from testimonial evidence . . . . In both, the jury must use its experience with people and events in weighing the probabilities."); *United States v. Graham,* 622 F.3d 445, 448 (6th Cir.2010) ("[P]hysical evidence is not a prerequisite to sustaining a conviction."). The state court provided a detailed, compelling summary of the evidence, albeit circumstantial, against Hutton.

***62** Hutton also contests the credibility and strength of Simmons' testimony. This Court, however, may "not reweigh the evidence nor make assessments of witness credibility." *Pinchon v. Myers,* 615 F.3d 631, 644 (6th Cir.2010). Moreover, contrary to Hutton's assertion, Simmons was not the State's "sole witness." The State presented numerous other witnesses, including Eileen Sweeney, Bernard Holloway, Kimberly Lampkin, Mary Pollard and the hospital security guards, who corroborated key aspects of Simmons' testimony.[21]

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[21] For example, Eileen Sweeney corroborated Simmons' description of Hutton's pistol. (App. to Return of Writ, Trial Tr., vol. 2, 1184 .) Bernard Holloway and Kimberly Lampkin verified that Hutton was angry at Mitchell and Simmons about, and searching for, the sewing machine the day before Mitchell was last seen. (*Id.* at vol. 3, 1347–48, 1391, 1393, 1410.) In fact, Lampkin testified that she and Mitchell had "dropp[ed] off"

Hutton has not shown that the jury's verdict was unreasonable in light of the evidence adduced at trial. Nor has Hutton demonstrated that the state court's conclusion that the evidence was sufficient was contrary to, or an unreasonable application of, *Jackson*. Given the strong circumstantial evidence that Hutton committed the murder and kidnapping, at least one "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." This claim, therefore, fails.

F. *Sixth Ground for Relief: Trial Court Error in Admitting Rape Evidence*

Hutton claims for this sixth ground for relief that the trial court erred by admitting Eileen Sweeney's testimony that Hutton raped her, of which he was later acquitted and which he argues was unduly prejudicial. (ECF No. 66, 51–56.) The Ohio Supreme Court found that the admission of this evidence constituted error, but held that the error was harmless and therefore not reversible. *Hutton*, 53 Ohio St.3d at 39–41, 559 N.E.2d at 438–40. Hutton contends that the court "used an improper standard to determine the error to be harmless." (ECF No. 66, 51.)

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a sewing machine to someone that day. (*Id.* at 1429, 559 N.E.2d 432.) Mary Pollard confirmed Simmons' account of what occurred at her house after Simmons had been shot. (*Id.* at 1876–77, 559 N.E.2d 432.) And the hospital security guards corroborated Simmons' testimony that Hutton had dropped him off at the hospital after he was shot and returned later with Sweeney, and that Hutton had threatened him while he was in the hospital. (*Id.* at 1524–25, 1532, 1551–52, 559 N.E.2d 432.)

1. Procedural Posture

Hutton raised this claim on direct appeal. The Eighth District Court of Appeals held that Eileen Sweeney's testimony about the rape was inadmissible and found reversible error. *Hutton,* 1988 WL 39276, at ——20–22, 32–34. The Ohio Supreme Court reversed. It, too, found the evidence inadmissible under Rule 404(B) of the Ohio Rules of Evidence, because "the rape was neither 'inextricably intertwined' with the murder, nor relevant for any purpose." *Hutton,* 53 Ohio St.3d at 40, 559 N.E.2d at 439. But it found the error harmless given the strength of the evidence against Hutton, as described above. *Id.* at 41, 559 N.E.2d at 439–40; *see supra* Section VI.E.2.

Hutton also raised this claim in his first post-conviction petition, submitting to the trial court the journal entry showing his acquittal of the rape charge. (App. to Return of Writ, vol. 11, 130–31, 47.) The post-conviction court denied the claim. It stated,

> The Ohio Supreme Court fully examined every aspect of this issue and found that the statements made by Sweeney were proper in order to show the logical order of the evening's events. Moreover, an instruction was given to the jury so that they would use this evidence properly. Since this issue was already raised on direct appeal, it is *res judicata.*

***63** (*Id.* at 217, 559 N.E.2d 432.) The court's decision was upheld by the Eighth District Court of Appeals on the ground of res judicata. *Hutton,* 2004 WL 1575248, at *1. This claim is preserved for federal habeas review.

2. Merits

"[F]ederal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). *See also Estelle v. McGuire,* 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Generally, therefore, "alleged errors in evidentiary rulings by state courts are not cognizable in federal habeas review." *Moreland v. Bradshaw,* 699 F.3d 908, 923 (6th Cir.2012). Hutton, however, asserts that the trial court's admission of Eileen Sweeney's testimony about the rape violated his constitutional right to due process. (ECF No. 66, 55.) Evidentiary rulings made by state courts may "rise to the level of due process violations [if] they 'offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Seymour v. Walker,* 224 F.3d 542, 552 (6th Cir.2000) (quoting *Montana v. Egelhoff,* 518 U.S. 37, 43, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)).

Thus, the Supreme Court has held that habeas petitioners may be entitled to relief based on a constitutional error at trial if "they can establish that it resulted in 'actual prejudice.' " *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (challenging the trial court's admission of evidence, for impeachment purposes, of defendant's post-*Miranda* silence). Actual prejudice is present when the error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 623. "The proper standard by which

to gauge the injurious impact of the admission of constitutionally infirm evidence is to consider the evidence before the jury absent the constitutionally infirm evidence." *Brumley v. Wingard,* 269 F.3d 629, 646 (6th Cir.2001) (citing *Gilliam v. Mitchell,* 179 F.3d 990, 995 (6th Cir.1999) (holding admission of taped confession of witness invoking Fifth Amendment privilege to be harmless error on the basis of the other evidence admitted at trial), and *Stoner v. Sowders,* 997 F.2d 209, 213 (6th Cir.1993) (rejecting argument that the admission of the videotaped testimony of available key witnesses was harmless error by examining the rest of the trial record)).

Respondent does not dispute that the trial court erred in allowing Eileen Sweeney to testify that Hutton raped her. (ECF No. 64, 79–82.) Instead, she argues that Hutton "fails to address how [the harmless-error] standard was improperly applied and how this decision was prejudicial. Hutton merely attacks the merits of the testimony." (*Id.* at 79.) The Court agrees. Hutton has not explained how the Ohio Supreme Court "used an improper standard to determine the error to be harmless." The court did exactly what is required for a harmless-error analysis under *Brecht:* it examined the "other admissible evidence, standing alone," and found it to "constitute[ ] overwhelming proof of guilt." *Hutton,* 53 Ohio St.3d at 41, 559 N.E.2d at 439.

***64** Nor has Hutton demonstrated that the state court was unreasonable in its determination that the trial court's error was harmless given the substantial

evidence supporting Hutton's murder and kidnapping convictions.[22] The only argument that he offers to support his claim is that "the introduction of such inflammatory evidence, of which Hutton was later exonerated in a separate trial, created an impermissible risk that the jury would not be mindful of the instruction, particularly since it was removed in time from the testimony it referenced." (ECF No. 66, 55–56.) Without more, Hutton cannot

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[22] Hutton further argues that AEDPA deference does not apply to this claim, and the Court should review it de novo. (ECF No. 66, 51.) He contends that because Hutton's acquittal on the rape charges was not part of the record before the Ohio Supreme Court, and the court therefore did not consider the acquittal in its determination of harmless error, the court did not adjudicate the merits of this claim. This argument is not well-taken. First, Hutton cites two cases as support for this proposition, *Williams v. Anderson*, 460 F.3d 789, 804 (6th Cir.2006), and *Dickerson v. Bagley*, 453 F.3d 690, 698 (6th Cir.2006). Neither applies. Second, to the extent that Hutton is arguing that this claim is a new or different claim than the claim raised on direct appeal, his position is problematic. It contradicts his representation that he raised this claim on direct appeal, and it is therefore preserved for habeas appeal. (ECF No. 66, 51.) It also would result in the new claim being unexhausted and procedurally defaulted based on the post-conviction court's finding of res judicata. Finally, the Supreme Court has declined to decide "where to draw the line between new claims and claims adjudicated on the merits" for purposes of AEDPA review. *Pinholster*, 131 S.Ct. at 1401 n. 10. In this case, the state court found the admission of the evidence at issue to be error. The fact that Hutton was later acquitted confirms the risk-and prejudice-of admitting this type of evidence, but it does not change the harmless-error calculus performed by the court. Regardless, Hutton's claim regarding the admission of the rape evidence would fail even were the Court to review it de novo.

show that the trial court's error had a "substantial and injurious effect" on the jury's verdict. This claim is meritless.

G. *Eighth Ground for Relief: Trial Court's Failure to Define Aggravating Factor*

Hutton asserts in his eighth ground for relief that the trial court erred in failing to define the term "aggravating factor" for the jury before its penalty-phase deliberations, leaving the jury "without guidance in determining the factors to be considered when deciding the appropriateness of the death penalty in this case." (ECF No. 66, 62.)

1. Procedural Posture

Respondent claims that this claim is procedurally defaulted because Hutton did not raise it on direct appeal. (ECF No. 64, 83.) Hutton concedes that the claim is defaulted, but he argues that the bar is excused by his appellate counsel's failure to raise the claim. (ECF No. 66, 62.) As explained above, this Court finds Hutton's ineffective-assistance claim based on this ground to be meritless, and it therefore cannot be used as cause for the underlying defaulted claim. *See supra* Section VI.B.2.b. The claim is procedurally defaulted.

2. Merits

Even if this claim were not barred from habeas review, it is meritless. The Sixth Circuit has explained, "To warrant habeas relief because of incorrect jury instructions, [a petitioner] must show that the instructions, as a whole, were so infirm that they rendered the entire trial fundamentally unfair." *Murr v. United States,* 200 F.3d 895, 906 (6th

Cir.2000) (citing *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)). "When a court makes an error in instructing the jury, the proper inquiry is 'whether there is a reasonable likelihood that the jury' applied the instruction 'in an unconstitutional manner.' " *Doan v. Carter,* 548 F.3d 449, 455 (6th Cir.2008) (quoting *Victor v. Nebraska,* 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

As explained above, the Sixth Circuit addressed the identical alleged trial court error in the context of an ineffective-assistance-of-appellate counsel claim in *Hoffner v. Bradshaw,* 622 F.3d 487, 505–06 (6th Cir.2010). *See supra* Section VI.B.2.b. It held that even if the trial court committed an error by failing to define "aggravating circumstances," that error was "effectively cure [d]" by the Ohio Supreme Court's reweighing of the mitigating and aggravating circumstances. *Id.* at 506 (citing *Slagle v. Bagley,* 457 F.3d 501, 521 (6th Cir.2006)). *See also Clemons v. Mississippi,* 494 U.S. 738, 748–50, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (finding unconstitutionally overbroad jury instructions at the sentencing stage of capital case harmless error where state appellate court reweighed aggravating and mitigating evidence). It further held that even if appellate counsel were deficient for not having raised this claim, the result of the appeal would not have been different, because the trial court's omission was not a "structural" defect under *Arizona v. Fulminante,* 499 U.S. 279, 309–10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), which "affect 'the framework within which the trial proceeds' and are not simply errors in the

trial process itself, . . . such as a faulty jury instruction is." *Hoffner,* 622 F.3d at 506.

***65** The court's reasoning in *Hoffner* applies here. Even if the trial court committed error by failing to define the term "aggravating circumstances" in the sentencing jury instructions, the error was cured by the court of appeals' reweighing of mitigating and aggravating circumstances, which was then affirmed by the Ohio Supreme Court. *Hutton,* 72 Ohio App.3d at 351–52, 594 N.E.2d at 694–95; *Hutton,* 100 Ohio St.3d at 187–91, 797 N.E.2d at 960–63. Moreover, as the Sixth Circuit held, this omission in the trial court's jury instructions was not a "structural" defect, and therefore did not subvert the jury's role in deciding Hutton's sentence and "render[ ] the entire trial fundamentally unfair." The Ohio Supreme Court's decision on this claim was not unreasonable. This claim is meritless.

H. *Ninth Ground for Relief: No Sympathy Instruction*

Hutton argues for his ninth ground for relief, "The trial court improperly instructed the jury during the penalty phase of trial not to consider any sympathy in its determination of the appropriateness of the death penalty." (ECF No. 66, 69–70.) Hutton identifies the instruction at issue as: "You must not be influenced by any consideration of sympathy or prejudice." (App. to Return of Writ, Trial Tr., vol. 4, 2318.)

1. Procedural Posture

Hutton raised this precise claim on direct appeal to the Ohio Supreme Court, and it is preserved for habeas review.[23]

2. Merits

In deciding this issue, the Ohio Supreme Court first observed that it already had approved the instruction to which the contested language belonged in a prior case. *Hutton,* 53 Ohio St.3d at 49, 559 N.E.2d at 447. The court continued, "More important, the instruction was not even given in the penalty phase. Contrary to Hutton's contention, it was given only in the guilt phase, where it was incontestably proper." *Id.*

Apparently, Hutton has repeated his mistake in this Court. The jury instruction of which he complains was given in the guilt phase of Hutton's trial, not the penalty phase as he contends. But even if it were given during the penalty phase, it would be permissible. In *California v. Brown,* 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the Supreme Court rejected a capital defendant's argument that an instruction preventing the jury from being swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was unconstitutional. *Id.* at 542. The Court held, "Even a juror who insisted on focusing on [the phrase 'mere

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[23] In that appeal, Hutton asserted the following proposition of law: "During the penalty phase, the trial court may not instruct the jury to exclude consideration of sympathy. This instruction is violative of the Eighth and Fourteenth amendments of the United States Constitution." (App. to Return of Writ, vol. 6, 3.)

sympathy'] in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* Moreover, the Sixth Circuit has held that the *identical* jury instruction given during the penalty phase of a capital trial was constitutional under *Brown*. *Greer v. Mitchell*, 264 F.3d 663, 688 (6th Cir.2001) (court told jury during sentencing instructions, "You must not be influenced by any consideration of sympathy or prejudice"). Hutton's claim lacks merit.

I. *Tenth Ground for Relief: Improper Dismissal of Juror*

***66** After the jury returned Hutton's verdict, and before the penalty phase of the trial began, the court excused a juror who was visibly upset and replaced her with an alternate juror. The court then conducted this brief colloquy with the new juror:

> The Court: Mr. Phiel, you did sit and participate in this trial during the guilt phase, did you not, sir?
>
> Mr. Phiel: Yes, I did.
>
> The Court: And you participated up to the point of the Jury withdrawing to deliberate; is that right?
>
> Mr. Phiel: Yes.
>
> The Court: Now, sir, the question before us has to do with the Jury's verdict in the case as it returned this verdict. I will ask you, will you as an alternate—as a juror, a regular

> panelist who must now consider the punishment phase, do you adopt the conclusions of the regular panel, including [the excused juror], which was returned to the Court on the 29th day of January, 1986?
>
> Mr. Phiel: Yes.
>
> The Court: Are you now, sir, prepared to proceed with the panel to dispose of the remaining considerations in this case which the Court has before it this afternoon?
>
> Mr. Phiel: Yes.

(App. to Return of Writ, Trial Tr., vol. 4, 2373–74.)

Hutton contends for his tenth ground for relief that the trial court improperly dismissed the juror from the penalty phase of the deliberations and allowed the alternate juror, who had not deliberated in the guilt-phase deliberations, to deliberate regarding sentencing. He further argues that the trial court "erroneously instructed the alternate juror to adopt the findings of the remaining jurors, thereby depriving Hutton of his right to have all jurors make their own individual finding of the appropriateness of the death penalty." (ECF No. 66, 70–77.)

1. Procedural Posture

This claim is ripe for review. Hutton raised it on direct appeal to the Eighth District Court of Appeals and to the Ohio Supreme Court, both of which denied the claim. *Hutton,* 1988 WL 39276, at ——15–18; *Hutton,* 53 Ohio St.3d at 44–48, 559 N.E.2d at 442–45.

2. Merits

Hutton identifies two constitutional violations underlying this claim. First, he argues that the trial court's "erroneous exclusion of a sitting juror" violated his Sixth Amendment right to an impartial jury under *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and its progeny, which govern when prospective jurors who oppose the death penalty may or may not be excused for cause. (ECF No. 61, 38–39.) But *Witherspoon* does not apply here. This claim concerns the dismissal and substitution of a juror who was excused for personal reasons having nothing to do with her views of the death penalty. Hutton does not challenge the selection of the alternate juror on *Witherspoon* grounds, and his participation in the jury does not render the jury impartial.

Hutton further claims that the trial court's instruction to the alternate juror violated the constitutional rule established in *Mills v. Maryland,* 486 U.S. 367, 374–75, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), in which the Supreme Court held that the sentencing judge or jury may not refuse to consider, or be precluded from considering, "any relevant mitigating evidence." Hutton argues that because the alternate juror was instructed to accept the findings of his fellow jurors from the guilt phase of trial, if the other jurors did not consider mitigating evidence introduced during that phase of the trial, then "the trial court's instruction improperly prevented a juror from considering valid mitigation." (ECF No. 66, 76–77.) Hutton's argument is not well-taken. The instruction at issue advised the alternate only to adopt the jury's previous findings regarding

guilt; it did not restrict the new juror from considering any *mitigating circumstances* he may have heard during the guilt phase in any manner whatsoever.

***67** Furthermore, the Ohio Supreme Court directly addressed the constitutional implications of Hutton's claim when it discussed whether the trial court's instruction violated Ohio's statutory right to have a penalty recommendation made by the "trial jury." It observed,

> Our interpretation [of the Ohio statute] is consistent with the reasons for using "the trial jury" to recommend the sentence. In *Lockhart v. McCree* (1986), 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137, the United States Supreme Court, holding that using the same jury in both phases is constitutional, identified two legitimate state interests in that practice. First, a capital defendant "might benefit at the sentencing phase * * * from the jury's 'residual doubts' about the evidence presented at the guilt phase. * * * " *Id.* at 181, 106 S. Ct at 1769. Second, "in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase * * *." *Id.*
>
> Alternate jurors are selected in the same way as regular jurors and hear the same evidence. Since they see and hear the trial, they are as capable as regular jurors of considering the evidence admitted in the guilt phase, and quite as likely to entertain "residual doubts" and weigh them in the defendant's favor.

Hutton, 53 Ohio St.3d at 45, 59 N.E.2d at 443.

The state court's conclusion is reasonable,[24] and this claim fails.

J. Twelfth Ground for Relief: Proportionality

In his twelfth ground for relief, Hutton asserts that the Ohio courts "have not performed any meaningful proportionality review as is required by Ohio's statutory death penalty scheme." (ECF No. 66, 86–91.) Specifically, he complains that Ohio courts "typically" limit comparison of capital defendants' cases to other cases in which the death penalty was imposed based upon the same aggravating circumstances, ignoring cases with similar facts where the death penalty was not

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[24] In light of the Ohio Supreme Court's analysis of federal law, the Court rejects Hutton's argument that the state court did not adjudicate his federal claim relating to the alternate juror on the merits, and therefore the Court must review this claim de novo with no AEDPA deference. (ECF No. 66, 71.) Moreover, the Supreme Court recently explained in *Johnson v. Williams*, ––– U.S. ———, ———, 133 S.Ct. 1088, 1096, 185 L.Ed.2d 105 (Feb. 20, 2013), that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits" and apply AEDPA deference under § 2254(d). *See also Moreland v. Bradshaw*, 699 F.3d 908, 922 (6th Cir.2012) (noting that AEDPA deference appears to be required "where a federal issue has been raised but the state court denied the claim with a discussion solely of state law"). While this presumption is rebuttable "in some limited circumstances," *Johnson*, 133 S.Ct. at 1096, the Court does not find such circumstances present here. Finally, Hutton's due process claim regarding the dismissal of the juror would fail even were the Court to review it de novo.

imposed and failing to take into account that the comparison cases may have additional aggravating circumstances or less mitigating factors. (*Id.* at 86, 559 N.E.2d 432.)

1. Procedural Posture

Hutton states that he raised this issue on both direct and collateral appeals to the state courts, and the claim is therefore ripe for review. (*Id.*) Respondent argues that Hutton failed to appeal the claim to the Ohio Supreme Court on direct review and the claim is therefore abandoned and procedurally defaulted. (ECF No. 64, 95.)

The Court finds that Hutton did, in fact, raise this claim on direct and post-conviction review. (App. to Return of Writ, vol. 3, 38; vol. 6, 21; vol. 10, 142; vol. 11, 136.) The Ohio Supreme Court conducted an independent sentence evaluation as required by Ohio Rev.Code § 2929.05(A) and found Hutton's sentence appropriate and proportionate to death sentences approved in "similar cases" with felony-murder kidnapping and multiple-murder specifications. *Hutton,* 100 Ohio St.3d at 191, 797 N.E.2d at 963. This claim is preserved and ripe for review

2. Merits

***68** The United States Constitution does not require proportionality review. *See, e.g., Pulley v. Harris,* 465 U.S. 37, 50–51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Buell v. Mitchell,* 274 F.3d 337, 368 (6th Cir.2001). Moreover, the Sixth Circuit has declared:

> Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison.

> By limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed.

Buell, 274 F.3d at 369.

The Ohio Supreme Court's finding was not contrary to, or an unreasonable application of, federal law, and this claim also fails.

K. *Thirteenth Ground for Relief: Cumulative Error*

Hutton asserts in his thirteenth ground for relief that the cumulative effect of all the constitutional errors he alleges has deprived him of a fair trial and penalty-phase hearing. (ECF No. 60, 47; No. 66, 91–95.) Hutton claims that he did not raise this issue in state court. (ECF No. 66, 91.) Respondent states that Hutton raised a similar claim on direct appeal, but that this habeas claim is different and therefore procedurally defaulted. (ECF No. 64, 96.)

The Court will not engage in a procedural-default analysis, however, because this claim is meritless. This claim is not cognizable on habeas, as the Supreme Court has not " 'held that constitutional claims that would not individually support habeas relief may be cumulated in order to support relief.' " *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir.2006) (quoting *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir.2002)); *see also Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir.2006) ("cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue"). Moreover, because

Hutton has not established that any individual error occurred in the state courts, he cannot show that the cumulative error violated his constitutional rights. *See Keith,* 455 F.3d at 679.

VII. Certificate of Appealability Analysis

This Court must now determine whether to grant a Certificate of Appealability ("COA") for any of Hutton's grounds for relief. The Sixth Circuit has determined that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine [s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell,* 258 F.3d 484, 487 (6th Cir.2001); *see also Murphy v. Ohio,* 263 F.3d 466 (6th Cir.2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, this Court now must consider whether to grant a COA as to any of the claims Hutton presented in his Petition pursuant to 28 U.S.C. § 2253.

***69** That statute states in relevant part:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

> (2) A certificate of appealability may issue under paragraph (12) only if the applicant has make a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre—and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a *constitutional* right, rather than the federal right that was required prior to AEDPA's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre—and post-AEDPA versions of that statute in *Slack v. McDaniel,* 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle,* 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. Thus, the Court determined,

> [t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot,* includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

Id. at 483–04 (quoting *Barefoot,* 463 U.S. at 893 n. 4).

The Court went on the distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim is not procedurally defaulted, then a habeas court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined is procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

After taking the above standards into consideration, the Court finds as follows:

The Court will not issue a COA for grounds for relief 2 (*Brady* claim), 9 (sympathy instruction), 10 (dismissal of juror), and 11 (ineffective assistance of appellate counsel). No jurist of reason would debate the Court's conclusions on these claims.

***70** No COA will issue for grounds for relief 1 (ineffective assistance during guilt phase), 4 (sufficiency of the evidence), and 8 (trial court's failure to define "aggravating factors"), because they are unequivocally procedurally defaulted.

Finally, the Court will not issue a COA for grounds for relief 12 (proportionality) and 13 (cumulative error). These claims occur almost *pro forma* in capital habeas petitions but are routinely

rejected. Reasonable jurists would agree with this finding.

This Court will issue a COA for the following sub-claims asserted under ground for relief 3 relating to Hutton's ineffective assistance of trial counsel during the penalty phase: failure to investigate and present available mitigation evidence, and failure to object to the admission of the PSI and to the prosecutor's reference to his criminal record contained in the PSI. A COA will not issue for ground 3's remaining sub-claims. A reasonable jurist could debate this Court's conclusion on the merits of both sub-claims.

The Court also will issue a COA for grounds for relief 5 and 7, both asserting prosecutorial misconduct based on improper references to Hutton's prior criminal record, and ground for relief 6, relating to the trial court's admission of evidence of Hutton's alleged rape of Eileen Sweeney. A reasonable jurist could debate this Court's conclusion on the merits of those claims as well.

VIII. Conclusion

For the foregoing reasons, the Petition is denied. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could be taken in good faith as to the sub-claims specified above asserted under ground for relief 3, and grounds for relief 5, 6, and 7, and the Court issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b) as to those claims only. As to all remaining claims, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis

upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R.App. P. 22(b).

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 2476333

APPENDIX D

117 Ohio St.3d 1439

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

Supreme Court of Ohio

State
v.
Hutton

No. 2007-2231
|
March 26, 2008

APPEALS NOT ACCEPTED FOR REVIEW

Opinion

Cuyahoga App. No. 80763, 2007-Ohio-5443.

All Citations

117 Ohio St.3d 1439, 883 N.E.2d 457 (Table), 2008-Ohio-1279

APPENDIX E

2007 WL 2955663

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee
v.
Percy June HUTTON, Defendant-Appellant.

No. 80763.
|
Decided Oct. 11, 2007.

Civil Appeal from the Cuyahoga County Court of Common Pleas, Case No. CR-203416.

Attorneys and Law Firms

David L. Doughten, Cleveland, OH, for Appellant.

William D. Mason, Cuyahoga County Prosecutor, Kristen L. Sobieski, Assistant Prosecuting Attorney, Cleveland, OH, for Appellee.

Before SWEENEY, P.J., COONEY, J., and STEWART, J.

Opinion

JAMES J. SWEENEY, P.J.

*1 {¶ 1} Defendant-appellant, Percy June Hutton ("Hutton"), appeals the trial court's denial of his petition for postconviction relief. For the reasons that follow, we affirm the trial court's decision.

{¶ 2} Hutton assigns seven assignments of error for our review, which state:

{¶ 3} "I. The appellant was denied effective assistance of counsel at the culpability stage of the trial.

{¶ 4} "II. The failure to provide discovery which would enable the appellant to have developed his claims is in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

{¶ 5} "III. The failure of the prosecutor to provide favorable evidence for the appellant violated the mandate of *Brady v. Maryland.*

{¶ 6} "IV. The failure of the prosecutor to provide evidence of actual innocence violates the mandate of *Napue v. Illinois* (1959), 360 U.S. 264.

{¶ 7} "V. The appellant was denied effective assistance of counsel in the penalty phase of his capital trial.

{¶ 8} "VI. The trial court erred in failing to conduct a hearing because the appellant is actually innocent of the offenses charged.

{¶ 9} "VII. The trial court erred to the substantial prejudice of the appellant by summarily dismissing his postconviction petition without affording him an evidentiary hearing or allowing discovery."

{¶ 10} Hutton was found guilty of aggravated murder, murder, and attempted murder. The convictions arose from Hutton shooting two victims, one of whom died, over an alleged theft of a sewing machine. Hutton received the death penalty. A complete recitation of the facts surrounding the case can be found in *State v. Hutton* (1990), 53 Ohio St.3d 36.

{¶ 11} This is Hutton's second petition for postconviction relief. The first petition was filed on September 11, 1996. It was denied by the trial court. We subsequently affirmed the decision of the trial court. *State v. Hutton,* Cuyahoga App. No. 76348, 2004-Ohio-3731. Hutton filed a second petition for postconviction relief on February 2, 2001, which the trial court denied in a 12-page opinion. It is this decision which is the subject of the instant appeal.

Timeliness of Petition

{¶ 12} Am.Sub. S.B. 4 ("S.B.4"), effective September 21, 1995, amended Ohio's postconviction relief statute. S.B. 4 was codified in R.C. 2953.21. Prior to this amendment, the statute allowed the petitioner to file a postconviction petition "at any time" after his conviction. R.C. 2953.21(A)(2), as amended, now imposes certain time requirements for filing postconviction petitions.

{¶ 13} R.C. 2953.21(A)(2) requires:

{¶ 14} "a petition * * * shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."

***2** {¶ 15} S.B. 4 also expressly states that the amended deadline would apply to persons convicted before its effective date. S.B. 4, Section 3 contains a provision which extends the time limit for filing postconviction petitions for defendants convicted prior to September 21, 1995. Section 3 states:

{¶ 16} "A person who seeks postconviction relief pursuant to Sections 2953.21 through 2953.23 of the Revised Code with respect to a case in which sentence was imposed prior to the effective date of this act * * * shall file a petition within the time required in division (A)(2) of Section 2953.21 of the Revised Code, as amended by this act, or within one year from the effective date of this act, whichever is later."

{¶ 17} We find that S.B. 4, Section 3, and amended R.C. 2953.21(A)(2) are applicable to Hutton as he was convicted in February 1986, prior to the effective date of S.B. 4. See *State v. Schulte* (1997), 118 Ohio App.3d 184; *State v. Jester*, Cuyahoga App. No. 83520, 2004-Ohio-3611; *State v. Halliwell* (July 29, 1999), Cuyahoga App. No. 75986. Under the

above sections, Hutton was required to file his supplemental petition for postconviction relief by September 21, 1996, one year after the effective date of S .B. 4. However, the record reflects that Hutton did not file his petition until February 2, 2001, long after the expiration of the statutory deadline.

{¶ 18} Even though his petition was untimely filed, the trial court could still entertain the petition under limited circumstances. Pursuant to R.C. 2953.23, the trial court may entertain a postconviction petition filed after the expiration of the deadlines set forth in R.C. 2953.21(A) if:

{¶ 19} "(1) Either of the following applies:

{¶ 20} "(a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

{¶ 21} "(b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petitioner asserts a claim based on that right.

{¶ 22} "(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted * * *."

{¶ 23} Unless both of the above exceptions apply, the trial court has no jurisdiction to consider an untimely filed petition for postconviction relief. *State*

v. Elko, Cuyahoga App. No. 88441, 2007-Ohio2638; *State v. Travis*, Cuyahoga App. No. 88636, 2007-Ohio-2379; *State v. Mayes*, Cuyahoga App. No. 88426, 2007-Ohio2374.

{¶ 24} Hutton contends he was unavoidably prevented from timely discovering Laster's statement to the police because the State committed a *Brady* violation by failing to inform him about Laster's statement. Laster was a co-defendant of Hutton's. Laster pled guilty to involuntary manslaughter and kidnapping for his part in the crimes.

***3** {¶ 25} A *Brady* violation occurs when the prosecution suppresses evidence requested by the accused that is material to the guilt or punishment of the accused. *Brady v. Maryland* (1963), 373 U.S. 83, syllabus, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Hutton, however, has not shown that the State withheld evidence from him. According to Hutton's own petition and according to Laster's interview, Laster refused to cooperate with homicide detectives. Cleveland police reports reveal that Laster refused to provide police with a statement. Based on these factors, the State was not in possession of discoverable evidence.

{¶ 26} Hutton also contends Laster's testimony was not available until he agreed to come forward with the evidence and agreed to be interviewed by a private detective hired by Hutton. However, Hutton still waited to file his second petition based on this interview until almost a year and a half after the interview. The interview occurred on September 5, 1999, and Hutton filed his second petition on February 5, 2001.

{¶ 27} There is also no evidence that Laster rejected previous attempts by Hutton to obtain his statement. Laster was incarcerated from 1985 until recently, therefore, Hutton was aware of Laster's whereabouts. There is no proof of his unavailability.

{¶ 28} Moreover, even if Hutton did show Laster's statements were undiscoverable, he has failed to satisfy the second prong, which requires him to show by "clear and convincing evidence that, but for constitutional error at trial" or because this is a death penalty case, "constitutional error at the sentencing hearing," no "reasonable factfinder" would have found him guilty of the offenses he was convicted of, or found him eligible for the death penalty.

{¶ 29} A review of Laster's interview reveals that Laster admitted he was drunk the evening of the murders; was asleep in the car during the time the first victim was shot; and was not present when the other victim was shot. He also admitted he does not know what happened that night. Notably, he never stated that Hutton was innocent. The evidentiary value of this interview is negligible. It is quite reasonable that a jury still would have found Hutton guilty even if Laster had testified. Therefore, Hutton's lost opportunity to present this evidence did not deny his constitutional right to a fair trial. Thus, Hutton failed to satisfy the R.C. 2953.23 jurisdictional requirement of outcome-determinative constitutional error.

{¶ 30} Accordingly, we conclude because the requirements of R.C. 2953.23 were not met, the trial court was without jurisdiction to entertain Laster's

second petition for postconviction relief. Therefore, we affirm the trial court's denial of Hutton's petition, albeit on different grounds than those set forth by the trial court.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

*4 The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, J., and MELODY J. STEWART, J., concur.

All Citations

Not Reported in N.E.2d, 2007 WL 2955663, 2007-Ohio-5443

APPENDIX F

104 Ohio St.3d 1426

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

Supreme Court of Ohio

State

v.

Hutton

No. 2004-1494

|

December 15, 2004

APPEALS NOT ACCEPTED FOR REVIEW

Opinion

Cuyahoga App. No. 76348, 2004-Ohio-3731.

All Citations

104 Ohio St.3d 1426, 819 N.E.2d 709 (Table), 2004-Ohio-6585

APPENDIX G

2004 WL 1575248

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,

Eighth District, Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee
v.
Percy June HUTTON, Defendant-Appellant.

No. 76348.
|
Decided July 15, 2004.

Criminal appeal from Common Pleas Court, Case No. CR-203416.

Attorneys and Law Firms

William D. Mason, Cuyahoga County Prosecutor, Lisa Reitz Williamson, Assistant County Prosecutor, Cleveland, OH, for plaintiff-appellee.

David L. Doughten, Cleveland, OH, for defendant-appellant.

Opinion

PATRICIA ANN BLACKMON, P.J.

*1 {¶ 1} Appellant Percy Hutton appeals the trial court's dismissal of his petition for postconviction relief. The historical facts of this case are set forth

sufficiently in *State v. Hutton* (1990), 53 Ohio St.3d 26. In this appeal, Hutton assigns nine errors,[1] seven are barred by res judicata; consequently we confine our discussion to the following assigned errors:

{¶ 2} "I. The trial court erred to the substantial prejudice of the petitioner by summarily dismissing his post-conviction [sic] petition without affording him an evidentiary hearing or allowing discovery."

{¶ 3} "VII. Ohio's post-conviction [sic] system does not comply with the requirements of due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

{¶ 4} Having reviewed the record and the legal arguments of the parties, we affirm the trial court's judgment. The apposite facts relevant to the above assigned errors follow.

{ ¶ 5} As part of Hutton's postconviction relief petition, he attached thirteen affidavits. Eleven affidavits were from family and friends who swore Hutton was a good person, who knew karate, and taught it to their children.

{¶ 6} One affidavit was from Samuel Simmons, Sr., the father of one of the victims. Simmons averred his son Samuel, Jr. told him Hutton did not kill anyone. Simmons swore to this although he failed to testify to this at trial.

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[1] See Appendix.

{¶ 7} Affiant Helen Corley, Hutton's mother, averred that Samuel Simmons, Jr. told her Hutton did not shoot him. She was not called as a witness at trial.

{¶ 8} Upon reviewing these affidavits, the trial court denied Hutton's petition without a hearing. Hutton now appeals.

{¶ 9} In his first assigned error, Hutton argues the trial court erred when it failed to hold an evidentiary hearing or allow discovery.

{¶ 10} A hearing on a petition for postconviction relief is governed by R.C. 2953.21(C), which provides in pertinent part:

{¶ 11} "Before granting a hearing, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript."

{¶ 12} A criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing.[2] The trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant

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[2] *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169; *State ex rel. Jackson v. McMonagle* (1993), 67 Ohio St.3d 450, 619 N.E.2d 1017.

a hearing.[3] A petition for post-conviction relief may be dismissed without a hearing when the petitioner fails to submit with his petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief.[4] The test to be applied is whether there are substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits and the files and records of the case.[5]

*2 {¶ 13} Hutton argues the affidavits attached to his postconviction relief petition were sufficient to warrant an evidentiary hearing under R.C. 2953.21(C) and the trial court erroneously evaluated the credibility of the affiants in deciding not to grant an evidentiary hearing. In its March 29, 1999 journal entry, the trial court stated the affidavits Hutton submitted with his petition were specious and totally inadequate to substantiate a substantive ground for relief.[6]

{¶ 14} The United States Supreme Court has held that in state appellate review, fact finding based on a

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[3] R.C. 2953.21(C); *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823; *State v. Carpenter* (1996), 116 Ohio App.3d 292, 295, 688 N.E.2d 14.

[4] *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819; *State v. Apanovitch*, 107 Ohio App.3d 82 at 98, 667 N.E.2d 1041; *State v. Shugar* (May 21, 1995), Cuyahoga App. No. 62536.

[5] *State v. Strutton* (1988), 62 Ohio App.3d 248, 251, 575 N.E.2d 466.

[6] Journal Entry at P. 9.

record review can be adequate to afford a full and fair hearing within the meaning of Section 2254(d), Title 28, U.S.Code.[7] Federal circuit courts additionally have held that findings of fact by state trial courts may benefit from the presumption of correctness even when they have determined credibility based solely on a paper hearing.[8]

{¶ 15} In *State v. Calhoun*,[9] the Supreme Court of Ohio states the following regarding the review of accompanying affidavits:

{¶ 16} "1. In reviewing a petition for post conviction [sic] relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact.

{¶ 17} "2. Pursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for post conviction [sic] relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief."

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[7] *Sumner v. Mata* (1981), 449 U.S. 539, 545-546, 101 S.Ct. 764, 768, 66 L.Ed.2d 722, 730.

[8] *Buxton v. Lynaugh* (C.A.5, 1989), 879 F.2d 140, 142.

[9] 86 Ohio St.3d 279, 714 N.E.2d 905, paragraphs one and two of the syllabus.

{¶ 18} Further, the *Calhoun* court held in "assessing the credibility of affidavit testimony," trial courts "should consider all relevant factors" including the following:

{¶ 19} "(1) whether the judge reviewing the post conviction [sic] relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony."[10]

{¶ 20} In the case at bar, a review of the record reveals Hutton submitted thirteen affidavits from family and friends who all claim Hutton is a good man. Several of the affidavits rely on hearsay. More than half of the affiants claimed they were available to testify, but were never called.

***3** {¶ 21} None of these affidavits establish a substantive ground for relief. Consequently, the trial court's paper hearing and determination of credibility was correct.

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[10] *Calhoun* at 285, citing *State v. Moore* (1994), 99 Ohio App.3d 748, 754-756, 651 N.E.2d 1319.

{¶ 22} Hutton also asserts he was entitled to discovery. Although a postconviction relief proceeding under R.C. 2953.21 is civil in nature, the extent of the trial court's jurisdiction is set forth by the statute, and the petitioner is not entitled to discovery in the initial stages of a postconviction proceeding.[11] Furthermore, "the power to conduct and compel discovery under the civil rules is not included within the trial court's statutorily defined authority."[12] Consequently, Hutton's assigned error is overruled.

{¶ 23} In his seventh assigned error, Hutton contends Ohio's postconviction system does not comply with the requirements of due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He argues it fails to provide an individual with any meaningful opportunity to redress a wrongful conviction. We are unpersuaded by Hutton's argument.

{¶ 24} In 1965, the General Assembly of Ohio enacted four new sections in the Criminal Code of Ohio, namely, Sections 2953.21, 2953.22, 2953.23 and 2953.24. This enactment provided an opportunity for any person convicted of a criminal offense to apply directly to the trial court which imposed sentence, stating the grounds relied upon and asking the trial court to vacate or set aside the

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[11] *State v. Dean*, 149 Ohio App.3d 93, 776 N.E.2d 116, 2002-Ohio-4203.

[12] *Id.* at p. 96, 776 N.E.2d 116, citing *State v. Lundgren* (Dec. 18, 1998), Lake App. No. 97-L-110.

sentence.[13] R.C. 2953.21 et seq was enacted to provide "a new procedure" to make available "the best method of protecting constitutional rights of individuals, and, at the same time, provide a more orderly method of hearing such matters."[14]

{¶ 25} A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.[15] It bears emphasis that state postconviction review is not a constitutional right.[16] Postconviction review is a narrow remedy, since res judicata bars any claim that was or could have been raised at trial or on direct appeal.[17]

{¶ 26} Notwithstanding the narrow focus of the postconviction review under R.C. 2953.21, we believe this remedy provides adequate safeguards to protect the constitutional rights of individuals convicted of a criminal offense. Accordingly, Hutton's seventh assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

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[13] *Kott v. Maxwell* (1965), 3 Ohio App.2d 337, 210 N.E.2d 746.

[14] *Id.*

[15] See *State v. Crowder* (1991), 60 Ohio St.3d 151, 573 N.E.2d 652.

[16] *Id.*

[17] *State v. Duling* (1970), 21 Ohio St.2d 13, 254 N.E.2d 670; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, J., and TIMOTHY E. McMONAGLE, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX

*4 {¶ 27} *ASSIGNMENTS OF ERROR:*

{¶ 28} "I. The trial court erred to the substantial prejudice of the petitioner by summarily dismissing

his post-conviction [sic] petition without affording him an evidentiary hearing or allowing discovery."

{¶ 29} "II. The appellant was denied effective assistance of counsel in the guilt-innocence phase of the trial."

{¶ 30} "III. The failure of the state to provide exculpatory evidence deprived the appellant his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

{¶ 31} "IV. The trial court erred by allowing into evidence other acts testimony that was not inextricably connected to the offense."

{¶ 32} "V. Ineffective assistance of trial at the penalty phase of trial deprived the appellant of his rights established under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

{¶ 33} "VI. The trial court erred by failing to grant the appellant's motions for discovery, an investigator and an expert assistance."

{¶ 34} "VII. Ohio's post-conviction [sic] system does not comply with the requirements of due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

{¶ 35} "VIII. The appellant's convictions and/or sentence are void or voidable because the State of Ohio on direct appeal failed to prove beyond a reasonable doubt that any constitutional error which occurred during appellant's trial did not contribute to the conviction and sentence of the appellant."

{¶ 36} "IX. The petitioner's sentence is void or voidable under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. The petitioner's sentence of death is other defendants throughout the State of Ohio similarly charged. Ohio courts do not engage in effective proportionality review as is required by statute."

All Citations

Not Reported in N.E.2d, 2004 WL 1575248, 2004-Ohio-3731

APPENDIX H

100 Ohio St.3d 176
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
HUTTON, Appellant.

Nos. 2000–0816, 2000–1540.
|
Submitted June 3, 2003.
|
Decided Nov. 5, 2003.

**951 *176 SYLLABUS OF THE COURT

The doctrine of res judicata does not apply to bar a claim of ineffective assistance of appellate counsel not previously raised in an appeal where the defendant was represented on that appeal by the same attorney who allegedly had provided the ineffective assistance, even where the defendant was also represented on that appeal by another attorney who had not represented the defendant at the time of the alleged ineffective assistance.

Attorneys and Law Firms

***192** William D. Mason, Cuyahoga County Prosecuting Attorney, and Lisa Reitz Williamson, Assistant Prosecuting Attorney, for appellee.

****952** James A. Draper, Cuyahoga County Public Defender, and Robert M. Ingersoll, Assistant Public Defender, for appellant.

Opinion

MOYER, C.J.

{¶ 1} In 1986, a jury found that appellant, Percy "June" Hutton, murdered Derek "Ricky" Mitchell and attempted to kill Samuel Simmons Jr. on September 16, 1985. Hutton was convicted of aggravated murder with two death specifications. After a penalty hearing, the trial court sentenced Hutton to death.

{¶ 2} Hutton had once been a close friend of Mitchell and Simmons. However, Hutton became angry with the two men because he believed that they had stolen from him. On Friday, September 13, or Saturday, September 14, 1985, outside the house where Samuel Simmons Jr., then lived, Hutton confronted Simmons over the theft of a sewing machine belonging to Hutton.

{¶ 3} Claiming that he had seen Mitchell trying to sell the machine, Hutton demanded its immediate return. Simmons suggested that Hutton talk to Mitchell. During this conversation, Mitchell arrived. He and Hutton entered the residence and went upstairs together. When they returned, according to Simmons, Hutton said that "it wasn't what he was looking for and if he found out we had anything to do with what was missing or stolen he was going to kill us." Hutton also told Mitchell, "I'm tired with you f* * *ing with me and stuff like that."

*177 {¶ 4} Around midnight on Monday, September 16, 1985, Hutton drove to Simmons's house in a gray Chrysler Cordoba, accompanied by Bruce Laster, whose sister was engaged to Hutton.

Hutton asked Simmons to come with him and help him work on a car. When Simmons got into Hutton's car, he noticed a .22–caliber rifle lying on the back seat.

{¶ 5} Hutton drove to Mitchell's house, stating that he wanted to talk to Simmons and Mitchell. When they arrived, Simmons went in and brought Mitchell outside, telling him that "June wanted to talk to him." Hutton then confronted Mitchell, demanding the return of his sewing machine and accusing Mitchell of stealing some tires from Hutton's backyard. Hutton said that he had hidden $750 in the sewing machine.

{¶ 6} Mitchell denied taking the machine. However, Hutton insisted that Mitchell had tried to sell it to a Mr. Evans. Hutton demanded that Mitchell come with him to Evans's house to settle the issue. Hutton threatened to "f* * * [Mitchell] up" if Evans confirmed Mitchell's guilt.

{¶ 7} Mitchell and Simmons got into the car. Before pulling away from the curb, Hutton pointed the rifle into Simmons's side and said: "I don't appreciate you all breaking in my sister's house."

{¶ 8} Instead of going to Evans's house, Hutton drove to a parking lot behind an RTA bus facility. Hutton got out of the car and ordered Mitchell to get out as well. Hutton and Mitchell then walked a short distance from the car. Simmons could not hear their conversation, but he saw Hutton put a pistol against Mitchell's head.

{¶ 9} Hutton and Mitchell returned to the car. With Mitchell giving directions, Hutton drove to an

area known as "the Projects." Hutton and Mitchell went into a building and emerged after a few minutes with a white sewing-machine case.

{¶ 10} Hutton drove to his mother's house, took the case inside, and returned to the car. He then drove to the next street and pulled into an alley where a Cadillac El Dorado was parked. Hutton told Simmons that the El Dorado was the car he wanted to work on. Simmons got ****953** out of Hutton's car. Hutton then moved his car to the other end of the street. Leaving Laster and Mitchell in the car, he walked back to the alley, where Simmons was waiting.

{¶ 11} Hutton broke into the El Dorado with a screwdriver. When Simmons got inside, Hutton opened the hood and told him to try starting the engine. Hutton then walked back to Simmons, shot him twice in the back of the head, and ran up the alley.

{¶ 12} Unable to move at first, lying half in and half out of the car, Simmons cried for help. He managed to get up and stagger away in search of assistance. Simmons went first to the nearby home of Hutton's mother, then to Mary Etta ***178** Pollard's house next door. He banged on Pollard's front door and cried for help. Then he heard Hutton's car coming out of the nearby alley. He ran into Pollard's back yard and pounded on the back door, shouting that he had been shot.

{¶ 13} Hutton drove up and stopped in front of Pollard's house. He urged Simmons to "come here" or "come from back there." Hutton noticed that Pollard's son was looking out from his front door and

told him to close the door. Simmons begged Hutton to take him to the hospital. Hutton said, "Just shut up and get in the car," and Simmons obeyed. Mitchell and Bruce Laster were in the car with Hutton.

{¶ 14} Telling Mitchell that some unknown assailant had shot Simmons, Hutton drove to St. Luke's Hospital. Simmons asked Mitchell to go inside with him, but Mitchell said, "No. We [are] going to get the mother-f* * *er that did this to you."

{¶ 15} At 2:30 a.m., Mitchell, Hutton, and Laster returned to Mitchell's home. They woke Mitchell's girlfriend, Eileen Sweeney, and took her to the hospital, where they dropped her off. Sweeney went into the hospital to visit Simmons. Telling her that Hutton had shot him, Simmons sent her to warn Mitchell to get out of the car. She went outside, but the car was gone.

{¶ 16} Hospital security officer Paul Whitcomb saw a Chrysler Cordoba drop Simmons off and leave "in a hurry." About half an hour later, Whitcomb saw the same car drop off Sweeney. After Sweeney went inside, Whitcomb saw the same car parked across the street from the hospital. He sent security officer Gary Barnhard to get the license number. As Barnhard drove past the car, he saw its two occupants crouch down in an attempt at concealment. Then the car left. A subsequent check of the license number disclosed that the gray Chrysler was registered to Hutton's fiancée, Celeste Laster.

{¶ 17} Hutton and Bruce Laster later returned to the hospital without Mitchell. Sweeney was still

there. Hutton told her that Mitchell was at home and offered to drive her back. However, once he had Sweeney inside the car, Hutton took her to a park instead. There, Hutton and Sweeney got out of the car. Laster then drove off, and Hutton proceeded to rape Sweeney. During the rape, Hutton told Sweeney that "Ricky wasn't coming back." According to Sweeney, Hutton had in his possession a small handgun with a white handle and a silver-colored barrel.

{¶ 18} When Laster returned with the car, Sweeney saw Hutton remove two rifles from the trunk and put them in the rear passenger compartment. Hutton then drove Sweeney home to the apartment she shared with Mitchell.

***179** {¶ 19} When they arrived, Mitchell was not there. The door to the apartment had been damaged and the apartment was in disarray. Sweeney was too "scared and nervous" to drive, so Hutton drove her to the home of LaWanda Mitchell, the sister ****954** of Ricky Mitchell. Hutton followed Sweeney into LaWanda's house. According to Sweeney, Hutton told her that "Ricky [Mitchell] wasn't coming back," and that "if [she] told, someone would be looking for [her]."

{¶ 20} On Tuesday, September 17, Hutton drove to Indianapolis to enroll in a course for automotive mechanics at the Lincoln Technical Institute.

{¶ 21} On September 30, 1985, the body of Derek Mitchell was found near an intersection in Cleveland with a large tire lying on the body. An autopsy disclosed that Mitchell had been shot to death. Two .22–caliber long rifle bullets were recovered from the

body; a firearms expert testified that these could have been fired from either a rifle or a handgun. The expert testified that the bullets that killed Mitchell had the same class characteristics as a bullet that had been removed from Simmons's head, but he could not tell whether all three had been fired from the same gun. The murder weapon was never found.

{¶ 22} The defense presented evidence that Mitchell was not killed on September 16, 1985, but at some later time while Hutton was in Indianapolis. Denise Richardson testified that she spoke to Mitchell at 3:00 p.m. on September 17, 1985, the day after the state claims Mitchell was murdered. According to Hutton, he was in Indianapolis at the time Richardson spoke to Mitchell. Hutton claimed that he stayed in Indianapolis until October 3, except for two brief visits to Cleveland on September 21 and 28. An employee of the Indianapolis YMCA saw Hutton there sometime after 4:00 p.m. on September 17. The YMCA employee testified that Hutton had paid rent for the period of September 17 through October 3.

{¶ 23} On October 4, 1985, Cleveland Police Detective Robert Moore spoke to Hutton on the telephone. Hutton agreed to return to Cleveland and surrender to Moore at a prearranged time and place. On October 5, Hutton surrendered.

{¶ 24} Hutton and Laster were jointly indicted on two counts of aggravated murder for killing Derek Mitchell. The first count charged that they committed the murder with prior calculation and design. R.C. 2903.01(A). The second charged them with murdering Mitchell while committing,

attempting, or fleeing the commission or attempted commission of kidnapping. R.C. 2903.01(B). Each murder count carried two capital specifications: a course-of-conduct specification, R.C. 2929.04(A)(5), and a felony-murder kidnapping specification, R.C. 2929.04(A)(7). Hutton and Laster were also indicted for kidnapping Mitchell and Simmons, and for the attempted murder of Simmons. Each count carried a firearm specification.

***180** {¶ 25} Hutton was tried separately from Laster. The jury convicted Hutton of all charges and specifications. After a mitigation hearing, the jury recommended a death sentence. The trial judge sentenced Hutton to death.

Proceedings on Appeal

{¶ 26} Represented by the now-deceased Floyd B. Oliver, Hutton appealed his convictions to the Court of Appeals for Cuyahoga County. The court of appeals reversed Hutton's convictions and sentence and remanded the cause to the common pleas court for retrial. *State v. Hutton* (Apr. 28, 1988), Cuyahoga App. No. 51704, 1988 WL 39276 ("*Hutton I*"). Having reversed the convictions, the court of appeals did not perform an independent review of Hutton's death sentence.

{¶ 27} We allowed the state's motion to certify the record. *State v. Hutton* (1988), 39 Ohio St.3d 716, 534 N.E.2d 88. Hutton filed a cross-appeal. ****955** 41 Ohio St.3d 704, 534 N.E.2d 1206; *State v. Hutton* (1989), 41 Ohio St.3d 725, 535 N.E.2d 1370. Hutton was represented in this court by Oliver and David L. Doughten.

{¶ 28} We sustained the state's propositions of law, rejected Hutton's propositions on cross-appeal, and reversed the judgment of the court of appeals. *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432 ("*Hutton II*"). Following the precedent set in *State v. Gillard* (1988), 40 Ohio St.3d 226, 235, 533 N.E.2d 272, we remanded the cause to the court of appeals, directing that court to perform an independent review of the death sentence in accordance with R.C. 2929.05(A). *Hutton II*, 53 Ohio St.3d at 50, 559 N.E.2d 432.

The Appeal from Remand (No. 2000–1540)

{¶ 29} On remand, the court of appeals affirmed the death sentence. *State v. Hutton* (1991), 72 Ohio App.3d 348, 594 N.E.2d 692 ("*Hutton III*"). Oliver filed a motion for reconsideration on Hutton's behalf. The court of appeals denied the motion. Hutton did not file an appeal of that judgment to this court.

{¶ 30} On August 21, 1991, Oliver died. Since no appeal had been filed, no further action occurred until July 17, 1996, when we granted the state's motion to set an execution date. 76 Ohio St.3d 1421, 667 N.E.2d 24. On September 19, 1996, we stayed execution pending completion of postconviction proceedings. 76 Ohio St.3d 1480, 669 N.E.2d 861. On October 18, 2000, we granted Hutton's motion for a delayed appeal of the 1991 judgment of the court of appeals on remand. 90 Ohio St.3d 1441, 736 N.E.2d 903. Case No. 2000–1540, which we decide today, is that delayed appeal

The Application for Reopening (No. 2000–0816)

{¶ 31} On April 21, 1997, Hutton filed in the court of appeals an application for reopening of his direct appeal, pursuant to App.R. 26(B). Hutton's application ***181** alleged ineffective assistance of appellate counsel based on failure to raise three issues in the court of appeals in *Hutton I*, and also because counsel had failed to raise other issues in this court in *Hutton II*.

{¶ 32} The court of appeals denied the motion on March 20, 2000. *State v. Hutton* (Mar. 20, 2000), Cuyahoga App. No. 51704, 2000 WL 301097 ("*Hutton IV*"). Hutton now appeals from this judgment. He subsequently moved to consolidate No. 2000–0816 with his delayed appeal in No. 2000–1540 for purposes of oral argument and disposition. On July 25, 2001, we granted the motion to consolidate. 92 Ohio St.3d 1446, 751 N.E.2d 484. Today, we decide the consolidated appeals.

I. Ineffective Assistance of Appellate Counsel

I. Ineffective Assistance of Appellate Counsel

{¶ 33} A convicted defendant is entitled to the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821. In his proposition of law in case No. 2000–0816, Hutton contends that his appellate counsel failed to effectively assist him in his original appeal in 1988.

{¶ 34} In case No. 2000–1540, the appeal from *Hutton III* (the court of appeals' proceedings on remand), Hutton asserts five claims of ineffective appellate assistance. Three claims involve *Hutton I*,

his original appeal in the court of appeals; one claim involves *Hutton II*, his 1989 cross-appeal to this court; and one involves *Hutton III*. In case No. 2000–0816, the appeal from *Hutton IV* (the denial of reopening), Hutton includes only the claims involving *Hutton I* and *II*.

**956 A. Original Appeal in Court of Appeals (*Hutton I*)

{¶ 35} In Parts A through C of his first proposition of law, Hutton claims that his counsel in *Hutton I* failed to raise three issues before the court of appeals. The state contends that Hutton's ineffective-appellate-assistance claim is res judicata, and that it lacks merit as well.

1. Res Judicata Analysis

{¶ 36} In *Hutton II*, Hutton raised seven propositions of law on cross-appeal from the judgment of the court of appeals. We decided six of those issues—Hutton's first and third through seventh propositions of law on cross-appeal—adversely to Hutton. Having sustained several of the state's propositions of law, we reversed the court of appeals' judgment and thereby reinstated Hutton's convictions. We therefore remanded this case to the court of appeals for the sole purpose of allowing that court to perform its statutorily mandated independent review. Id. at 50, 559 N.E.2d 432. "The fact that the cause was remanded to the court of appeals for re-evaluation of the death sentence in no way implicated the ***182** finality of those convictions." *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 143, 652 N.E.2d 710.

{¶ 37} Hutton's claims in the *Hutton II* cross-appeal did not include any claim that his appellate counsel had been ineffective in *Hutton I*. "Where an argument could have been raised on an initial appeal, *res judicata* dictates that it is inappropriate to consider that same argument on a second appeal following remand." *D'Ambrosio*, 73 Ohio St.3d at 143, 652 N.E.2d 710. Accord *State v. Gillard* (1997), 78 Ohio St.3d 548, 549, 679 N.E.2d 276 (on appeal after remand, "new issues" are barred by res judicata). Since Hutton's ineffective-appellate-assistance claims pertaining to his counsel's performance in *Hutton I* could have been raised on his *Hutton II* cross-appeal, they would normally be res judicata on appeal from remand.

{¶ 38} Similarly, since Hutton did not raise the ineffective-appellate-assistance claim in his *Hutton II* cross-appeal, res judicata would ordinarily bar him from raising it in his application for reopening under App.R. 26(B). See *State v. Gillard* (1999), 85 Ohio St.3d 363, 365, 708 N.E.2d 708.

{¶ 39} However, Hutton points out that the attorney who had represented him in *Hutton I* continued to represent him before this court in *Hutton II*. We have recognized that an attorney "cannot realistically be expected to argue his own incompetence." *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 2 OBR 661, 443 N.E.2d 169, fn. 1. Cf. *State v. Lentz* (1994), 70 Ohio St.3d 527, 639 N.E.2d 784 (claim of ineffective assistance of trial counsel, raised for first time in postconviction proceedings, is barred by res judicata where appellate counsel is different attorney, even though from same public defender's office as trial counsel). Since Hutton's counsel could

not have been expected to raise in *Hutton II* the issue of his own ineffective representation in *Hutton I*, Hutton argues that res judicata does not bar raising the issue now, either in the appeal from remand or on his motion to reopen the *Hutton I* appeal.

{¶ 40} In *Hutton II*, Hutton also had one new attorney who had not represented him in *Hutton I* and was therefore free of any personal conflict.

{¶ 41} Courts of appeals in Ohio have generally held that res judicata bars an ineffective-assistance claim not raised in an appeal, even where the defendant was represented on appeal by his trial counsel, so long as the defendant was also represented on appeal by at least one attorney who had not represented the defendant at trial. ****957** See *State v. Zuern* (Dec. 4, 1991), Hamilton App. Nos. C–900481 and C–910229, 1991 WL 256497; *State v. Swiger* (1998), 125 Ohio App.3d 456, 465, 708 N.E.2d 1033; *State v. Broom* (May 7, 1998), Cuyahoga App. No. 72581, 1998 WL 230425; *State v. Landrum* (Jan. 11, 1999), Ross App. No. 98 CA 2401, 1999 WL 22626.

***183** {¶ 42} However, in *State v. Evans* (June 19, 1998), Lucas App. No. L–97–1134, 1998 WL 351884, the court held that, where the appellant continues to be represented by his trial counsel on appeal, "one additional counsel on appeal does not permit the application of *res judicata* to claims of ineffective assistance of [trial] counsel," because "[i]t is unlikely that, as co-counsel with [trial counsel], [new counsel] would be inclined to assert a claim on appeal for ineffective assistance of trial counsel." We agree with this reasoning and today hold that the doctrine

of res judicata does not apply to bar a claim of ineffective assistance of appellate counsel not previously raised in an appeal where a defendant was represented on appeal by the same attorney who allegedly earlier provided the ineffective assistance, even where the defendant was also represented on that appeal by another attorney who had not represented the defendant at the time of the alleged ineffective assistance. Accordingly, Hutton's claims that he received ineffective assistance in *Hutton I* are not res judicata, and we proceed to the merits of those claims.

2. Merits Analysis

{¶ 43} Hutton claims that his counsel rendered ineffective assistance in his first appeal as of right (i.e., the court of appeals' proceedings in *Hutton I*) by failing to raise three issues.

{¶ 44} Appellate counsel's effectiveness is to be judged by the standard set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. See, e.g., *State v. Mitts*, 98 Ohio St.3d 325, 2003-Ohio-1007, 784 N.E.2d 698, ¶ 4. Hence, to prevail on his ineffective-assistance claim, Hutton must show deficient performance and resulting prejudice. Deficient performance means performance falling below an objective standard of reasonable representation. "Prejudice" means a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. See, also, *Williams v. Taylor* (2000), 529 U.S. 362, 390–391, 120 S.Ct. 1495, 146 L.Ed.2d 389; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538

N.E.2d 373, paragraphs two and three of the syllabus.

a. *DePew* issue

{¶ 45} The trial court, in its penalty-phase jury instructions, listed all seven of the statutory mitigating factors in R.C. 2929.04(B), and the prosecutor discussed all seven in his closing argument, even though several were not raised by the defense. Citing *State v. DePew* (1988), 38 Ohio St.3d 275, 289–290, 528 N.E.2d 542, Hutton contends that the trial court and the prosecutor erred in discussing mitigating factors on which Hutton had not presented evidence.

{¶ 46} Hutton correctly contends that such comment is inconsistent with *DePew*. "If the defendant chooses to refrain from raising some of or all of the ***184** factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution. * * *

{¶ 47} "[I]t is the defendant who has the right to present and argue the mitigating factors. If he does not do so, no comment on any factors not raised by him is permissible." ****958** 38 Ohio St.3d at 289, 528 N.E.2d 542.

{¶ 48} Hutton claims that his appellate counsel rendered ineffective assistance by not raising the *DePew* issue in the court of appeals. This claim lacks merit.

{¶ 49} First, *DePew* was not available as precedent to Hutton's appellate counsel. The court of appeals issued its opinion in *Hutton I* on April 28,

1988. We did not decide *DePew* until four months later, on August 31, 1988.

{¶ 50} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Because attorney performance is not to be judged by hindsight, courts generally do not find that an attorney performs deficiently by failing to anticipate a future decision or development in the law. See *State v. Smith* (1991), 72 Ohio App.3d 342, 345, 594 N.E.2d 688. See, also, *Clark v. Moran* (C.A.1, 1991), 942 F.2d 24, 33; *Jameson v. Coughlin* (C.A.2, 1994), 22 F.3d 427, 429; *Senk v. Zimmerman* (C.A.3, 1989), 886 F.2d 611, 618; *Lilly v. Gilmore* (C.A.7, 1993), 988 F.2d 783, 786; *Brown v. United States* (C.A.8, 2002), 311 F.3d 875, 878; *Spaziano v. Singletary* (C.A.11, 1994), 36 F.3d 1028, 1039; *Fretwell v. State* (1987), 292 Ark. 96, 728 S.W.2d 180.

{¶ 51} Second, Hutton contends that, had counsel raised the *DePew* issue in the court of appeals, this court "would have had to reverse [his] death sentence." On the contrary, we find it unlikely that a *DePew* claim would have succeeded. We have never reversed a death sentence on the ground that the trial court gave the jury an instruction that neutrally listed all statutory mitigating factors, even though the list included factors on which the defense had not presented evidence or argument. Such errors have consistently been held either harmless or not plain error. See *State v. Benge* (1996), 75 Ohio St.3d 136,

141–142, 661 N.E.2d 1019; *State v. Grant* (1993), 67 Ohio St.3d 465, 481, 620 N.E.2d 50; *State v. Brewer* (1990), 48 Ohio St.3d 50, 62, 549 N.E.2d 491; *State v. Cooey* (1989), 46 Ohio St.3d 20, 39, 544 N.E.2d 895; *State v. Benner* (1988), 40 Ohio St.3d 301, 317, 533 N.E.2d 701. Thus, no reasonable likelihood exists that Hutton would have prevailed on the *DePew* issue had his counsel raised it in *Hutton I*. Part A of Hutton's first proposition of law is overruled.

b. Failure to Define "Aggravating Circumstances"

{¶ 52} In the penalty phase, the trial court instructed the jury: "The prosecution has the burden to prove beyond a reasonable doubt that the aggravating ***185** circumstances, of which the Defendant was found guilty, outweigh the factors in mitigation * * *." The instructions further told the jury to recommend a death sentence "if you unanimously * * * find proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors." However, the trial court neglected to inform the jury that the term "aggravating circumstances" meant the specifications of which Hutton had been found guilty in the guilt phase. Defense trial counsel did not object to the instructions.

{¶ 53} Hutton's appellate counsel in *Hutton I* did not raise the issue of the trial court's failure to define "aggravating circumstances." In part B of his first proposition of law, Hutton now contends that ****959** appellate counsel's failure to raise this issue constituted ineffective assistance.

{¶ 54} However, because defense trial counsel had not objected to the instructions at trial, any error was waived. Having been waived, the error could not serve as a basis for reversal unless it met the strict standard for plain error. See, generally, *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. Because the issue had been waived at trial, appellate counsel could reasonably decide not to try to raise it in the court of appeals. See *State v. Bays* (1999), 87 Ohio St.3d 15, 29, 716 N.E.2d 1126.

{¶ 55} Appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 750–753, 103 S.Ct. 3308, 77 L.Ed.2d 987. "Notwithstanding *Barnes,* it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. See, *e.g., Gray v. Greer,* 800 F.2d 644, 646 (C.A.7 1986) ('Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome')." *Smith v. Robbins* (2000), 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756.

{¶ 56} Failure to raise the waived instructional issue was not deficient performance constituting ineffective assistance. Part B of Hutton's first proposition of law is therefore overruled.

c. Trial Counsel's Failure to Object

{¶ 57} Although the *DePew* error and the trial court's instructional error were waived by trial

counsel, Hutton's appellate counsel could have argued on appeal that trial counsel's failure to object to these errors amounted to ineffective assistance. In part C of his first proposition of law, Hutton argues that his appellate counsel were ineffective because they failed to raise the issue of trial counsel's failure to object.

***186** {¶ 58} With respect to the *DePew* error, trial counsel was not ineffective for failing to raise the issue. As noted supra, *DePew* was not decided until August 31, 1988, and therefore was not available to trial counsel as precedent. For the reasons discussed earlier, prejudice is also absent.

{¶ 59} Hutton argues that appellate counsel was ineffective in failing to assert trial counsel's ineffectiveness regarding the trial court's failure to define "aggravating factors" for the jury. However, we do not find that this issue was "clearly stronger," *Smith v. Robbins*, 528 U.S. at 288, 120 S.Ct. 746, 145 L.Ed.2d 756, than the issues Hutton's appellate counsel actually did present. Part C of Hutton's first proposition of law is overruled.

B. Cross-Appeal (*Hutton II*)

{¶ 60} In part D of his first proposition of law, Hutton contends that his counsel before this court in *Hutton II* denied him effective assistance by misreading the court of appeals' opinion and thereby failing to raise certain issues before us on cross-appeal. See *Hutton II*, 53 Ohio St.3d at 44, 559 N.E.2d 432.

{¶ 61} However, Hutton's appeal from the court of appeals to this court was not his first appeal, but his

second. "Having no constitutional right to counsel on a second appeal, [Hutton] had no constitutional right to the effective assistance of counsel." *State v. Buell* (1994), 70 Ohio St.3d 1211, 1212, 639 N.E.2d 110. Part D of Hutton's first proposition of law is overruled.

****960 C. 1991 Decision on Remand to Court of Appeals (*Hutton III*)**

{¶ 62} In Part E of his first proposition of law, Hutton claims that he was denied the effective assistance of counsel when the court of appeals considered his case on remand from this court in 1991.

{¶ 63} Because the court of appeals in *Hutton I* reversed Hutton's convictions, that court did not perform an independent review of Hutton's death sentence. Therefore, when our decision in *Hutton II* reinstated his convictions, we remanded the cause to the court of appeals so that court could independently review the sentence, as was then required by R.C. 2929.05(A). See *Hutton II*, 53 Ohio St.3d at 50, 559 N.E.2d 432. No other issues remained for the court of appeals to determine on remand, inasmuch as the court of appeals had already addressed each of Hutton's assignments of error in *Hutton I*.

{¶ 64} On November 2, 1990, Hutton filed a motion asking the court of appeals to appoint counsel. The court of appeals denied the motion without explanation on January 8, 1991. On January 17, 1991, the court of appeals announced its judgment in *Hutton III*, affirming the death sentence on independent review. On January 28, 1991,

Hutton filed a motion for reconsideration. On February 1, ***187** 1991, the court of appeals journalized its opinion in *Hutton III,* explaining its reasons for affirmance. See *Hutton III,* 72 Ohio App.3d 348, 594 N.E.2d 692.

{¶ 65} Hutton contends that when the court of appeals denied his motion for appointment of counsel, it denied him the assistance of counsel to which he was constitutionally entitled. Hutton contends that he was not represented by *any* counsel during the remand.

{¶ 66} However, Hutton's claim is incorrect. The record shows that his motion for reconsideration, filed January 28, 1991, was signed by the same attorney who had represented him during both *Hutton I* and *Hutton II.*

{¶ 67} It is true that no brief was filed on Hutton's behalf during the remand. The court of appeals did not invite briefing by either party. But there was no need to do so, for both parties had already had a full opportunity to brief the issue of the appropriateness of the death sentence during the original *Hutton I* proceedings. Moreover, Hutton's counsel had taken that opportunity. In the *Hutton I* appellate brief of October 26, 1988, the third assignment of error read as follows: "IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, §§ 9 AND 16 OF THE OHIO CONSTITUTION, THE APPELLANT'S SENTENCE OF DEATH IS INAPPROPRIATE AND DISPROPORTIONATE TO SIMILAR CASES."

{¶ 68} Since the parties had already briefed the sentencing issue once, there was no need for rebriefing or reargument. The record had not changed since *Hutton I*. The court of appeals could quite properly consider the case on the briefs that had already been filed. Part E of Hutton's first proposition therefore lacks merit and is overruled.

II. Independent Sentence Review

{¶ 69} In his second proposition of law, Hutton contends that the death sentence in this case is inappropriate. This claim invokes our duty of independent review under R.C. 2929.05. It is that task to which we now turn.

{¶ 70} Under R.C. 2929.05(A), we independently review the death sentence in every capital case in which we find no reversible legal error on the capital conviction. We must determine whether the ****961** evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether the death sentence is proportionate to those affirmed in similar cases.

Aggravating Circumstances

{¶ 71} Hutton was found guilty of two capital specifications. Under R.C. 2929.04(A)(5), he was found guilty of engaging in a course of conduct involving the ***188** purposeful killing of Ricky Mitchell and the purposeful attempt to kill Samuel Simmons. Under R.C. 2929.04(A)(7), he was found guilty of committing aggravated murder while committing, attempting to commit, or fleeing after

the commission or attempted commission of kidnapping.

{¶ 72} The evidence supports these findings. As we noted in *Hutton II*:

{¶ 73} "The evidence * * * points ineluctably to Hutton as the murderer of Derek Mitchell. Hutton had a strong motive: revenge for the theft of the sewing machine and the money hidden therein. Hutton claimed to have been told by Evans that Mitchell had tried to sell Evans a sewing machine. Hutton accused Mitchell of 'breaking in my sister's house.' In response to Hutton's demands, Mitchell actually produced a sewing machine, which he turned over to Hutton. Finally, Hutton carried out his threat to shoot Simmons. On this record, it is clear that Hutton believed that Mitchell and Simmons stole his machine.

{¶ 74} "Hutton attempted to kill Simmons with a .22 caliber revolver. He also had a .22 caliber rifle in his car. Mitchell was killed with a .22 caliber weapon. Expert testimony established that Simmons could have been shot with the same gun. Eileen Sweeney corroborated Simmons's description of Hutton's pistol. Mitchell's corpse was found with a tire lying on it—a significant fact in light of the evidence that Hutton believed that Mitchell had stolen tires from him.

{¶ 75} "Hutton told Eileen Sweeney that 'Ricky wasn't coming back,' and she should 'forget about him.' These statements clearly show that Hutton knew Mitchell was dead. He later informed her that 'if * * * [she] told[,] someone would be looking

for * * * [her].' This threat indicates consciousness of guilt.

{¶ 76} "Events confirmed Hutton's statement that Mitchell 'wasn't coming back.' Eileen Sweeney * * * never saw Mitchell again after he left her at the hospital. This was unusual, since Sweeney testified that, during their three-year cohabitation, Mitchell '[v]ery seldom' failed to spend the night at their apartment and never left home without telling her.

{¶ 77} "The evidence that the murder was committed with prior calculation and design is, if anything, stronger. Mitchell was shot at least twice, once in the head and once in the chest. * * * When this is added to Hutton's repeated threats against Mitchell's life, a rational trier of fact could hardly fail to find prior calculation and design." 53 Ohio St.3d at 41, 559 N.E.2d 432.

{¶ 78} Moreover, Simmons's testimony that Hutton shot him twice in the head from behind supports the jury's finding of guilty on the course-of-conduct specification. Finally, the evidence supports the jury's finding of kidnapping. *Hutton II,* 53 Ohio St.3d at 41, 559 N.E.2d 432.

***189 Mitigating Factors**

{¶ 79} The only evidence offered by Hutton in the penalty phase was his unsworn statement, in which he professed his innocence, and the presentence investigation report and psychological examination requested by the defense pursuant to ****962** R.C. 2929.03(D)(1). The only mitigating factor expressly offered by Hutton at trial was residual doubt. That is not a valid mitigating factor. *State v. McGuire*

(1997), 80 Ohio St.3d 390, 686 N.E.2d 1112, syllabus. However, the trial record does disclose some other mitigating factors.

{¶ 80} *Provocation:* Under R.C. 2929.04(B)(2), we must consider "[w]hether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."

{¶ 81} On the state's theory of the case, Hutton killed Mitchell and tried to kill Simmons because they stole money he needed to attend school. Hutton testified that his tuition for the automotive course was $9,700. He made a down payment of $1,500, had taken a $5,300 student loan, and was seeking a $2,200 grant from the state of Ohio. This left him $700 short,[1] which may explain why Hutton was so insistent on recovering the $750 hidden in the sewing machine.

{¶ 82} Nevertheless, provocation deserves very little weight as a mitigating factor. Hutton committed the murder with prior calculation and design; the jury so found by returning a guilty verdict on the first count of the indictment. Moreover, Mitchell's murder occurred some length of time after the alleged theft that may have provoked it. Hutton clearly had time to cool off before resorting to murder.

{¶ 83} *Degree of participation:* Under R.C. 2929.04(B)(6), mitigation exists "[i]f the offender was

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[1] When he registered at the Lincoln Institute, however, he discovered that he could not use the grant there.

a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts which led to the death of the victim."

{¶ 84} The jury did not make any finding in this case that Hutton was the principal offender. The felony-murder specification alleged, in the alternative, that Hutton "either * * * was the principal offender in the commission of the Aggravated Murder, *or*, if not the principal offender, committed the Aggravated Murder with prior calculation and design." (Emphasis added.) The verdict form for this specification was also phrased in the alternative. For this reason, the jury cannot be said to have found that Hutton was the principal offender.[2] ***190** Hence, we must examine "the degree of the offender's participation in the offense and * * * in the acts which led to the death of the victim."

{¶ 85} Although the record does not conclusively demonstrate that Hutton was the actual killer, Hutton did instigate Mitchell's murder. Moreover, he played the leading role in that offense. Hutton was driving the car and did almost all of the talking. Hutton was the one who had a motive to kill Simmons and Mitchell, he was the one who had threatened their lives, and he was the one who shot

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[2] We note, however, that the jury did unanimously find that Hutton killed Mitchell with prior calculation and design when it found Hutton guilty of aggravated murder as charged in the first count of the indictment. *See State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 197-198, 616 N.E.2d 909.

Simmons. Accordingly, we give the (B)(6) factor little weight.

{¶ 86} *Other factors:* Hutton voluntarily returned from Indianapolis and surrendered to Detective Moore. We give some weight to this fact as mitigation under R.C. 2929.04(B)(7): "Any other factors that are relevant to the issue of whether ****963** the offender should be sentenced to death."

{¶ 87} *History, character, and background:* Hutton was born on October 28, 1953. The presentence investigation report shows that his father died in 1963, when Hutton was still a child. Although it is not clear whether Hutton's mother and father were ever divorced, Hutton's mother remarried in 1960. However, her second husband abandoned the family in 1965.

{¶ 88} Hutton was self-employed as an automotive mechanic. Before he surrendered to Detective Moore, he was taking courses in that field at Lincoln Technical Institute. He testified in the guilt phase that he had also been employed as a security guard and had completed a six-week, 120–hour course of "security [and] private police training" at Case Western Reserve University. He had also been on general relief and food stamps "off and on" since 1981, and he admitted that he had never reported his income from repairing cars to the welfare authorities.

{¶ 89} There was also guilt-phase testimony about Hutton's good reputation. Samuel Simmons Sr., the father of victim Samuel Simmons Jr., testified in the guilt phase that Hutton had a "[v]ery good" reputation for truthfulness. Simmons Sr. also

testified that he "would put [his] life in [Hutton's] hands any day." We give some mitigating weight to Hutton's history, character, and background.

{¶ 90} *Nature and circumstances of the offense:* Nothing mitigating appears in the nature and circumstances of the offense. The murder of Derek Mitchell was characterized by treachery and deceit. After he shot Simmons from behind, Hutton used Simmons's shooting to lure Mitchell to his death.

{¶ 91} Although Hutton's voluntary surrender and his history, character, and background are entitled to some weight in mitigation, the aggravating circumstances ***191** here are extremely grave. In this case, we find that the R.C. 2929.04(A)(5) multiple-murder aggravating circumstance carries great weight in aggravation. See *State v. Campbell* (2002), 95 Ohio St.3d 48, 58, 765 N.E.2d 334. The R.C. 2929.04(A)(7) aggravating circumstance in this case consists of a calculated murder set up by a treacherous kidnapping. We find that these aggravating circumstances outweigh the mitigating factors in this case beyond a reasonable doubt.

Proportionality Review

{¶ 92} In his third proposition of law, Hutton contends that the death sentence in this case is "excessive and disproportionate" to sentences in similar cases.

{¶ 93} Hutton claims that one "similar case" we should consider is the case of Hutton's co-defendant, Bruce Laster. According to the parties, Laster pled guilty to involuntary manslaughter and was

sentenced to 7 to 25 years.[3] Hutton argues that, because there was no proof of who actually shot Mitchell, it cannot be justified to sentence Hutton to death when Laster received a sentence of only 7 to 25 years.

{¶ 94} However, we find that Laster's case is not a "similar case" for purposes of R.C. 2929.04. Laster was not convicted of aggravated murder, nor did he receive a death sentence. See *Gillard*, 78 Ohio St.3d at 558, 679 N.E.2d 276; ****964** *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus.

{¶ 95} The death sentence in this case is proportionate to death sentences we have approved in similar cases with specifications under R.C. 2929.04(A)(5) and (A)(7). See *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568; *State v. Dickerson* (1989), 45 Ohio St.3d 206, 543 N.E.2d 1250; *State v. Hawkins* (1993), 66 Ohio St.3d 339, 612 N.E.2d 1227; *State v. Dunlap* (1995), 73 Ohio St.3d 308, 652 N.E.2d 988; *State v. Palmer* (1997), 80 Ohio St.3d 543, 687 N.E.2d 685; *State v. Jackson* (2001), 92 Ohio St.3d 436, 751 N.E.2d 946.

{¶ 96} In case No. 2000–1540, we affirm Hutton's death sentence. In case No. 2000–0816, we affirm the judgment of the court of appeals.

Judgments affirmed.

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[3] Although we are unable to verify this from the record, Hutton asserts is in his brief and the state agrees that it is true.

RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER, LUNDBERG STRATTON, O'CONNOR and O'DONNELL, JJ., concur.

All Citations

100 Ohio St.3d 176, 797 N.E.2d 948, 2003 -Ohio-5607

APPENDIX I

2000 WL 301097

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

STATE of Ohio Plaintiff-Appellee
v.
Percy HUTTON Defendant-Appellant

No. 51704.
|
March 20, 2000.

Character of Proceeding: Application for Reopening, Motion No. 82719 Lower Court No. 203416. Application Denied.

Attorneys and Law Firms

William D. Mason, Cuyahoga County Prosecutor, George Sadd (# 0005981), Assistant County Prosecutor, Cleveland, for Plaintiff-Appellee.

Robert M. Ingersoll (# 0023748), Public Defender, Cleveland, for Defendant-Appellant.

JOURNAL ENTRY AND OPINION

SPELLACY, J.

***1** Appellant, Percy Hutton, has filed an application for reopening pursuant to App.R. 26(B). Apparently, the applicant is attempting to reopen the

appellate judgments that were rendered by this court in *State v. Hutton* (April 28, 1988), Cuyahoga App. No. 51704, unreported, and *State v. Hutton* (Jan. 17, 1991), Cuyahoga App. No. 51704, unreported. The original judgment of this court, as announced on January 17, 1991, reversed the appellant's conviction and sentence of death and further remanded the case for retrial. The Supreme Court of Ohio, however, reversed the judgment of this court and ordered an independent review of the sentence of death upon remand. *See State v. Hutton* (1990), 53 Ohio St.3d 36. On remand, this court weighed the aggravating circumstances as well as the mitigating factors, and determined, as mandated by R.C. 2929.05(A), that the aggravating circumstances outweighed the mitigating factors. This court on remand, also found that the sentence of death was appropriate. *See, State v. Hutton* (Jan 17, 1991), Cuyahoga App. No. 51704, unreported.

An application for reopening, as filed pursuant to App.R. 26(B)(1), must be filed within ninety days of journalization of the appellate judgment which the applicant seeks to reopen. If the application is not timely filed, App.R. 16(B)(2)(b) requires that the applicant establish good cause as to why the application was filed more than ninety days after journalization of the appellate judgment. *State v. Cooey* (1995), 73 Ohio St.3d 411; *State v. Reddick* (1995), 72 Ohio St.3d 88.

Herein, the applicant is attempting to reopen the appellate judgments that were journalized on May 9, 1988 (judgment of trial court reversed and remanded) and February 1, 1991 (supplemental journal entry and death sentence affirmed). The

present application, however, was not filed until April 21, 1997, more than six years after journalization of the appellate judgment which affirmed the sentence of death. The applicant provides no viable explanation for the delay of six years in filing his application for reopening and further fails to establish good cause for the untimely filing of his application for reopening. Thus, the application must be denied. *State v. Oden* (1996), 74 Ohio St.3d 234; State v. Hairston (1995), 73 Ohio St.3d 346; *State v. Tucker* (1995), 73 Ohio St.3d 152.

Further review of the prior record on appeal and the application for reopening demonstrates that the doctrine of *res judicata* prevents this court from reopening the applicant's direct appeal. *Res judicata* will be applied to bar the further litigation of errors of law that have been raised or could have been raised upon appeal. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175. In addition, the Supreme Court of Ohio has established that a claim of ineffective assistance of appellate counsel will be barred from review by the doctrine of *res judicata* unless circumstances render the application of the doctrine unjust. *State v. Murnahan* (1992), 63 Ohio St.3d 60.

***2** Herein, the applicant possessed a prior opportunity to raise and argue the claim of ineffective assistance of appellate counsel upon direct appeal to the Supreme Court of Ohio from the judgment of this court which affirmed the applicant's sentence of death. The applicant, however, did not take an appeal to the Supreme Court of Ohio, following the appellate judgment as journalized on February 1, 1991, and has further failed to provide

this court with any reason as to why such an appeal was not filed with the Supreme Court of Ohio. Thus, we decline to reopen the applicant's original appeal. *State v. Hicks* (October 28, 1982), Cuyahoga App. No. 44456, unreported, reopening disallowed (April 19, 1994), Motion No. 50328, affirmed (August 3, 1994), 70 Ohio St.3d 1408.

Finally, a review of the applicant's application for reopening fails to demonstrate that there exists "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." See App.R. 26(B)(5). Each of the applicant's four proposed assignments of error are "factually, legally, and logically weak" and do not create a genuine issue of ineffective assistance of appellate counsel. *State v. Allen* (1996), 77 Ohio St.3d 172.

Accordingly, we deny the applicant's application for reopening.

DIANE KARPINSKI and MICHAEL J. CORRIGAN, JJ., concur.

All Citations

Not Reported in N.E.2d, 2000 WL 301097

APPENDIX J

72 Ohio App.3d 348
Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

The STATE of Ohio, Appellee,
v.
HUTTON, Appellant.

No. 51704.
|
Decided Feb. 1, 1991.

Attorneys and Law Firms

****693 *348** John T. Corrigan, Pros. Atty., Cleveland, for appellee.

***349** Floyd B. Oliver, Cleveland, for appellant.

OPINION

MATIA, Judge.

The matter presently before this court involves the remand of the criminal appeal of *State v. Hutton* (May 9, 1988), Cuyahoga App. No. 51704, unreported, 1988 WL 39276, from the Supreme Court of Ohio pursuant to the decision of *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432. On remand, this court is *solely* concerned with an independent review of the sentence of death and whether the aggravating circumstances outweigh the mitigating factors as mandated by R.C. 2929.05(A).

On October 16, 1985, appellant, Percy "June" Hutton, was indicted by the grand jury of Cuyahoga County for the following five offenses:

(1) Count One-the aggravated murder of Derek Mitchell with prior calculation and design in violation of R.C. 2903.01(A) with a firearm specification, R.C. 2929.71(A), and two capital specifications consisting of a course-of-conduct specification, R.C. 2929.04(A)(5), and a felony-murder specification of kidnapping, R.C. 2929.04(A)(7);

(2) Count Two-the aggravated murder of Derek Mitchell while committing, attempting, or fleeing the commission or attempted commission of kidnapping in violation of R.C. 2903.01(B) with a firearm specification, R.C. 2929.71(A), and two capital specifications consisting of a course-of-conduct specification, R.C. 2929.04(A)(5), and a felony-murder specification of kidnapping, R.C. 2929.04(A)(7);

(3) Count Three-the kidnapping of Derek Mitchell in violation of R.C. 2905.01 with a firearm specification, R.C. 2929.71(A);

(4) Count Four-the kidnapping of Samuel Simmons, Jr. in violation of R.C. 2905.01 with a firearm specification, R.C. 2929.71(A); and

(5) Count Five-the attempted murder of Samuel Simmons, Jr. in violation of R.C. 2903.02 and 2923.02 with a firearm specification, R.C. 2929.71(A).

On January 29, 1986, a jury of the Cuyahoga County Court of Common Pleas returned a verdict of guilty as to all charges and specifications as found in

the five-count indictment. On February 3, 1986, the penalty phase was commenced and at the conclusion of the mitigation hearing, the jury found that the aggravating circumstances outweighed the mitigating factors, thus recommending a sentence of death. The trial court followed the jury's recommendation and sentenced the appellant to death on February 7, 1986.

This court, upon consideration of the appellant's appeal, reversed the conviction and sentence of death in a split decision. The state of Ohio ***350** appealed the reversal of the appellant's conviction and sentence of death to the Supreme Court of Ohio. In addition, the appellant filed a cross-appeal from the judgment of this court. The Supreme Court of Ohio reversed the judgment of this court, thus reinstating the appellant's original conviction and sentence of death. In addition, the Supreme Court of Ohio remanded the matter to this court for an independent review of the sentence of death as well as a determination of whether the aggravating circumstances outweigh the mitigating factors, stating:

"The judgment of the court of appeals is reversed. This cause is remanded to the court of appeals for independent review of the sentence. On remand, the court of appeals must weigh the aggravating circumstances as well as the mitigating factors, and determine, as required by R.C. 2929.05(A), whether the aggravating circumstances outweigh the mitigating factors and whether the sentence of death is the appropriate sentence in this case." *State v. Hutton, supra,* at 50, 559 N.E.2d at 447-448.

****694** R.C. 2929.05(A), which deals with the appellate review of a sentence of death, provides that:

"(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded

from the record that the aggravating circumstances the offender was found guilty of committing *351 outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

Thus, pursuant to R.C. 2929.05(A), this court is required to independently determine whether: (1) the record supports the jury's finding of the statutory aggravating circumstances; (2) the statutory aggravating circumstances outweigh any mitigating factors; (3) the trial court properly weighed the statutory aggravating circumstances against the mitigating factors; (4) the sentence of death is not disproportionate to the penalty imposed in similar cases; and (5) the sentence of death is consequently appropriate.

In the case *sub judice,* the evidence adduced at trial supports the jury's finding of the statutory aggravating circumstances of R.C. 2929.04(A)(5) (prior calculation and design or mass murder) and R.C. 2929.04(A)(7) (felony murder). The evidence clearly reveals that with prior calculation and design and while committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, the appellant caused the death of Derek Mitchell.

In addition, an independent review of the record by this court discloses that the aggravating circumstances outweigh the mitigating factors. R.C. 2929.04(B), which defines the mitigating factors to be weighed against the aggravating circumstances, provides that:

" * * * [T]he court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in ****695** the offense and the degree of the offender's participation in the acts that led to the death of the victim;

***352** "(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

In support of the mitigating factors of R.C. 2929.04(B), the appellant made an unsworn

statement to the jury which essentially reaffirmed his innocence. The appellant, through his unsworn statement, stated that: (1) the appellant was convicted for an incident which occurred one week prior to the alleged murder; (2) there was no truth to the shooting and disappearance of Derek Mitchell; (3) the appellant was sorry that Derek Mitchell was dead; (4) the appellant possessed no intentions to harm Derek Mitchell; and (5) Eileen Sweeney had lied about her alleged rape. In addition, a presentence investigation and a psychiatric evaluation report were presented to the jury for consideration during the penalty phase.

A review of the appellant's unsworn statement, the presentence investigation, and the psychiatric evaluation report fails to disclose the existence of any of the mitigation factors as enumerated in R.C. 2929.04(B). Thus, the aggravating circumstances must outweigh the mitigating factors. *State v. Beuke* (1988), 38 Ohio St.3d 29, 526 N.E.2d 274.

Finally, a review of the record fails to disclose that the trial court's sentence of death was excessive or disproportionate to the penalty of death imposed in similar cases. *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13, 490 N.E.2d 906; *State v. Martin* (1985), 19 Ohio St.3d 122, 19 OBR 330, 483 N.E.2d 1157; *State v. Mapes* (1985), 19 Ohio St.3d 108, 19 OBR 318, 484 N.E.2d 140. The sentence of death, as imposed by the trial court upon the appellant, was not excessive or disproportionate and thus was appropriate.

Therefore, the appellant's sentence of death is affirmed and the matter is remanded to the trial court for execution of sentence.

Judgment affirmed.

PATTON, P.J., concurs.

McMANAMON, Judge, concurring.

I believe the "other acts" evidence and gruesome photographs admitted during the guilt phase of the trial, and the introduction of the defendant's irrelevant criminal history in the mitigation phase, wholly undermined the jury's findings that the appellant was guilty of aggravated murder and the aggravated circumstances. See *State v. Hutton* (May 9, 1988), Cuyahoga App. No. 51704, unreported (concurring opinion). The Supreme Court, however, has ruled the evidence harmless or properly admitted. See *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432. Only because I am bound by ***353** the Supreme Court's decision do I concur in the majority opinion affirming the death sentence.

All Citations

72 Ohio App.3d 348, 594 N.E.2d 692

APPENDIX K

1991 WL 3956

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee,
v.
Percy HUTTON, Defendant-Appellant.

No. 51704.
|
Jan. 17, 1991.

Criminal Appeal from Common Pleas Court,
No. CR-203416.

Attorneys and Law Firms

John T. Corrigan, Cuyahoga County Prosecutor, Cleveland, for plaintiff-appellee.

Floyd B. Oliver, Cleveland, for defendant-appellant.

SUPPLEMENTAL JOURNAL ENTRY AND APPELLATE REVIEW OF DEATH SENTENCE

MATIA, Judge:

*1 Pursuant to the statutory requirements set forth in R.C. 2929.05(A), this court has reviewed the judgment, the sentence of death, the transcript and all of the facts and other evidence in the record in

this case and makes the following independent findings:

1) The aggravating circumstances for which the appellant was found guilty outweigh the mitigating factors in this case.

2) The sentence of death is not excessive nor disproportionate to the penalty imposed in similar cases and is appropriate.

3) The evidence supports the findings by the jury and the trial court that the appellant was guilty of aggravated murder and the aggravating circumstances charged in the indictment.

4) The trial court properly weighed the aggravating circumstances of which the jury found the appellant guilty and the mitigating factors.

5) The sentence of death is appropriate in this case.

PATTON, P.J., and McMANAMON, J., concur.

All Citations

Not Reported in N.E.2d, 1991 WL 3956

APPENDIX L

53 Ohio St.3d 36
Supreme Court of Ohio.

The STATE of Ohio, Appellant and Cross–Appellee,
v.
HUTTON, Appellee and Cross–Appellant.

No. 88–1074.
|
Submitted Feb. 6, 1990.
|
Decided Aug. 8, 1990.

****436** *Syllabus by the Court*

***37** 1. A presentence investigation report in a capital case may include the defendant's arrest record.

2. The "trial jury," as that term is used in R.C. 2929.03(C)(2)(b) and (D)(2), consists of all the jurors, including any properly substituted alternates. (*State v. Penix* [1987], 32 Ohio St.3d 369, 513 N.E.2d 744, distinguished.)

3. Crim.R. 24(F) is not violated in a capital case where an alternate juror is substituted for another juror after the guilt phase verdict, but before deliberations begin in the penalty phase.

On Friday, September 13, or Saturday, September 14, 1985, Percy "June" Hutton confronted Samuel Simmons, Jr. outside Simmons's home and accused him of stealing a sewing machine belonging to Hutton. Claiming that he had seen Simmons's

friend Derek "Ricky" Mitchell trying to sell the machine, Hutton demanded that Simmons give the machine back immediately. Simmons suggested that Hutton "go talk to Ricky."

When Mitchell arrived, Hutton went upstairs with him. When they came back down, according to Simmons, Hutton said that "it wasn't what he was looking for and if he found out we had anything to do with what was missing or stolen he was going to kill us."

The following Monday morning, September 16, Hutton went back to Simmons's home at about 12:00 a.m. and asked him to work on a car. Hutton and Simmons got into Hutton's car, where Bruce Laster was waiting for them. When he got in, Simmons saw a .22 caliber rifle on the back seat. Hutton drove them to Mitchell's house saying, "I want to talk to you and Ricky, man." When they arrived, Simmons told Mitchell that "June wanted to talk to him."

After accusing Mitchell of stealing tires from Hutton's back yard, Hutton demanded the return of his sewing machine, in which he had hidden $750. Mitchell denied taking the machine. Hutton insisted that Mitchell had tried to sell the machine to a Mr. Evans and demanded that Mitchell come with him to Evans's house. According to Simmons, Hutton said: " * * * If Evans said you ain't the one who tried to sell him the sewing machine, * * * I will apologize. If he say you tried to sell the sewing machine, that mean I'm f——ing you up. * * * "

Mitchell and Simmons got into the car. Hutton pointed the rifle at Simmons's side and said that he

didn't appreciate Simmons and others breaking into his sister's house.

Instead of going to Evans's house, Hutton drove to a parking lot behind a bus depot on 93rd Street. He ordered Mitchell out of the car. Mitchell and Hutton walked away from the car so that Simmons could **437 not hear their conversation, but he saw Hutton put a pearl-handled, nickel-plated, .22 *38 caliber automatic pistol to Mitchell's head.

Hutton and Mitchell returned to the car. Following Mitchell's directions, Hutton drove to a building on 30th Street. Hutton and Mitchell went inside for a few minutes and emerged with a white sewing machine case.

Hutton drove to his mother's house, took the case inside, and returned to the car. Hutton drove a short distance and parked in an alley next to a brown El Dorado. Simmons got out. Hutton moved his car to the other end of the street. He then walked back to the El Dorado.

Simmons got behind the wheel as Hutton "went under the hood" and said, "Try to start it." He then walked back to Simmons and shot him twice in the head.

Simmons, unable to move, lay partly in and partly out of the car and cried for help. No one responded. He managed to get up and stagger to two nearby houses to seek aid. Hutton found him pounding on the back door of the second house and told him to get into the car. Telling Mitchell that someone had shot Simmons, Hutton then drove Simmons to St. Luke's Hospital.

At the hospital, Simmons asked Mitchell to go inside with him. Mitchell refused and said they were going to get the person "that did this to you." Simmons then got out of the car and went into the hospital by himself.

At 2:30 a.m., Mitchell, Hutton, and Laster returned to Mitchell's apartment. They woke Mitchell's alleged common-law wife, Eileen Sweeney, and, taking her to the hospital, they dropped her off and left. Sweeney went in to visit Simmons. Telling her that Hutton had shot him, Simmons sent her to warn Mitchell to get out of the car. She went outside, but the car had gone. She never saw Mitchell again.

Half an hour later, Hutton and Laster returned to the hospital. Hutton told Sweeney that Mitchell was home and offered to take her there. Instead, Hutton took Sweeney to a park, where he raped her vaginally and orally. Hutton had a small handgun with a white handle and a silver-colored barrel. During the rape, Hutton advised Sweeney to "forget about" Mitchell because "Ricky wasn't coming back."

After the rape, Hutton took Sweeney home. The door to the apartment had been damaged and the apartment was in disarray. Mitchell was not there. Too "scared and nervous" to drive, Sweeney accepted Hutton's offer to drive her to the home of Mitchell's sister LaWanda. Hutton accompanied Sweeney into LaWanda Mitchell's house. Sweeney testified that "[H]e told me, Ricky wasn't coming back, and if I told[,] someone would be looking for me."

On September 30, a decomposing corpse was found near the intersection of East 88th Street and

St. Catherine Avenue, Cleveland. A large tire lay on the corpse. The autopsy disclosed that the body was Derek Mitchell's, and that Mitchell had been shot to death. Two bullets were recovered. A firearms expert identified them as .22 caliber long rifle ammunition that could have been fired from either a rifle or a handgun. The bullets that killed Mitchell had the same class characteristics as a bullet that had been removed from Simmons's head, but the expert could not tell whether all three had been fired from the same gun.

Hutton was indicted on two counts of murdering Derek Mitchell. The first count charged that he committed the murder with prior calculation and design. The second charged him with murdering Mitchell while committing, attempting, or fleeing the commission or attempted commission of kidnapping. ***39** Each murder count carried one firearm specification, R.C. 2929.71(A), and two capital specifications: a course-of-conduct specification, R.C. 2929.04(A)(5), and a felony-murder specification of kidnapping, R.C. 2929.04(A)(7).[1] Hutton was also indicted ****438** for kidnapping Mitchell and Simmons, and for the attempted murder of Simmons. Each count carried a firearm specification.

Hutton's defense was that Mitchell was not killed on September 16, but at some later time when

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[1] We observe that the trial court did not instruct the jury in the penalty phase as to what the aggravating circumstances were. However, Hutton specifically declined to object to the instructions at trial, and has not raised or briefed the issue here; therefore, we decline to address it.

Hutton was in Indianapolis. Denise Richardson testified that she saw Mitchell alive and spoke to him at about 3:00 p.m. on September 17, 1985, the day after the state claimed Mitchell was murdered. According to Hutton, he was in Indianapolis at the time Richardson spoke to Mitchell and stayed there until October 3, except for two brief visits to Cleveland on September 21 and 28. An employee of the Fall Creek branch of the Indianapolis YMCA saw Hutton there sometime after 4:00 p.m. on September 17. She testified that he paid rent covering the period September 17 to October 3.

A jury of the Cuyahoga County Court of Common Pleas convicted Hutton of all charges and specifications. After a mitigation hearing, the trial court sentenced him to death. The Court of Appeals for Cuyahoga County, in a split decision, reversed the conviction and sentence and remanded to the common pleas court for further proceedings. The state appealed this judgment. Hutton cross-appealed, alleging that the court of appeals erred in overruling several of his propositions of law.

The cause is now before this court pursuant to the allowance of a motion and cross-motion for leave to appeal.

Attorneys and Law Firms

John T. Corrigan, prosecuting attorney, and George J. Sadd, Cleveland, for appellant and cross-appellee.

Floyd B. Oliver and David L. Doughten, Cleveland, for appellee and cross-appellant.

Opinion

MOYER, Chief Justice.

The state advances seven propositions of law in support of its appeal. Hutton, cross-appealing certain aspects of the court of appeals' decision, asserts seven propositions of his own. For the reasons that follow, we reverse the judgment of the court of appeals and remand to that court for further proceedings.

I

The court of appeals held that Eileen Sweeney's testimony that Hutton raped her was inadmissible under R.C. 2945.59, the substantial equivalent, in relevant part, of Evid.R. 404(B). In its first proposition of law, the state contends that this holding was erroneous.

First, the state contends that evidence of the rape was admissible as evidence of Hutton's "scheme, plan, or system" under Evid.R. 404(B). "Scheme, plan, or system" evidence is relevant where it tends to prove the offender's identity or where " * * * the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. * * * To be admissible pursuant to this subcategory of 'scheme, plan, or system' evidence, the 'other acts' testimony must concern events which are inextricably ***40** related to the alleged criminal act. * * * " *State v.*

Curry (1975), 43 Ohio St.2d 66, 73, 72 O.O.2d 37, 41, 330 N.E.2d 720, 725.

The state suggests that the testimony "tended to establish identity of the criminal * * *." However, the rape, as distinct from what Hutton said during the rape, was clearly irrelevant to the identity of Mitchell's killer. We recently held that: " * * * 'Other acts' may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense. * * * " *State v. Smith* (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190, 194. See, also, *State v. Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682, 690. Evidence of the rape, under the facts here, did not constitute the type of *modus operandi* evidence that would tend to prove the identity of Mitchell's murderer.

****439** The state further argues that the rape is "inextricably related" to the murder. But it seems clear that the rape was not part of the "immediate background" of the murder. It was not part of "the same transaction as the act that * * * [was] the object of proof." 1 Weissenberger, Ohio Evidence (1985), Section 404.28.

The state's third argument is that the rape establishes additional motive for the murder. The state theorizes that Hutton murdered Mitchell and raped Sweeney for the same reason: because he wanted "to take Mitchell's place in Ms. Sweeney's life." However, the state presented no such theory to the jury. The state's consistent theme in closing argument was that Hutton wanted revenge on

Mitchell and Simmons because they had stolen from him.

Fourth, the state argues that the story of the rape was admissible to explain why Sweeney would accompany Hutton for an unspecified period even though she had reason to believe that Hutton had harmed Mitchell. The state's answer to that question, quoting from Judge Patton's dissent below, is that Hutton "detained her against her will from the time she reentered * * * [Hutton's] car at the hospital until she was released at LaWanda Mitchell's house. * * * *"

But the record is to the contrary. Sweeney testified that she entered Hutton's car at the hospital because Hutton "told * * * [her] that Ricky was at home and he [Hutton] would take * * * [her] there." There is no indication whatever in the record that Hutton forced her to go with him. It is understandable that the state would want to explain why, after what Simmons said, Sweeney would get into a car with Hutton. But the rape, which occurred later, simply does not explain it.

Finally, one possible theory of admissibility is not discussed in the state's brief, but was argued at trial. The prosecutor suggested that Hutton raped Sweeney to "terrorize" her into silence about what he had done to Mitchell. On this theory, the rape, like any other attempt to intimidate a witness, would be admissible to show consciousness of guilt.

However, Hutton did not tell Sweeney that "Ricky wasn't coming back" before he raped her; instead, he told her this during the rape. The rape could hardly have been motivated by Hutton's desire to keep

Sweeney from repeating information that he had not yet given her.

Since the rape was neither "inextricably intertwined" with the murder, nor relevant for any purpose, it was inadmissible under Evid.R. 404(B). But this conclusion does not end our inquiry. *41 If the other admissible evidence, standing alone, constitutes overwhelming proof of guilt, the error is harmless. *State v. Zuern* (1987), 32 Ohio St.3d 56, 60–61, 512 N.E.2d 585, 590; *State v. Williams* (1983), 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323, paragraph six of the syllabus.

The evidence in this case points ineluctably to Hutton as the murderer of Derek Mitchell. Hutton had a strong motive: revenge for the theft of the sewing machine and the money hidden therein. Hutton claimed to have been told by Evans that Mitchell had tried to sell Evans a sewing machine. Hutton accused Mitchell of "breaking in my sister's house." In response to Hutton's demands, Mitchell actually produced a sewing machine, which he turned over to Hutton. Finally, Hutton carried out his threat to shoot Simmons. On this record, it is clear that Hutton believed that Mitchell and Simmons stole his machine.

Hutton attempted to kill Simmons with a .22 caliber revolver. He also had a .22 caliber rifle in his car. Mitchell was killed with a .22 caliber weapon. Expert testimony established that Simmons could have been shot with the same gun. Eileen Sweeney corroborated Simmons's description of Hutton's pistol. Mitchell's corpse was found with a tire lying on it—a significant fact in light of the evidence that

Hutton believed that Mitchell had stolen tires from him.

Hutton told Eileen Sweeney that "Ricky wasn't coming back," and she should "forget ****440** about him." These statements clearly show that Hutton knew Mitchell was dead. He later informed her that "if * * * [she] told[,] someone would be looking for * * * [her]." This threat indicates consciousness of guilt.

Events confirmed Hutton's statement that Mitchell "wasn't coming back." Eileen Sweeney, Mitchell's alleged common-law wife, never saw Mitchell again after he left her at the hospital. This was unusual, since Sweeney testified that, during their three-year cohabitation, Mitchell "[v]ery seldom" failed to spend the night at their apartment and never left home without telling her.

The evidence that the murder was committed with prior calculation and design is, if anything, stronger. Mitchell was shot at least twice, once in the head and once in the chest. See *State v. Clark* (1988), 38 Ohio St.3d 252, 256, 527 N.E.2d 844, 850. When this is added to Hutton's repeated threats against Mitchell's life, a rational trier of fact could hardly fail to find prior calculation and design.

Finally, the evidence of kidnapping was overwhelming. Simmons's testimony showed that Hutton shot Simmons and falsely told Mitchell that someone else had done it. At the hospital, Mitchell said, in Hutton's presence, " * * * [W]e going to get the * * * [person] that did this to you." While there is no evidence that Hutton affirmatively caused Mitchell to believe that they were about to hunt

down Simmons's fictitious assailant, Hutton knew that Mitchell believed they were. Instead of correcting this belief, Hutton took advantage of it to lead Mitchell to his death. This constituted kidnapping by deception under R.C. 2905.01(A). See *State v. Amell* (1987), 303 Ore. 355, 736 P.2d 561; *State v. Dalton* (App.1980), 98 Wis.2d 725, 298 N.W.2d 398, 16 A.L.R.4th 654. The state's first proposition of law is sustained.

II

The state's second and fifth propositions of law are concerned with the role of the presentence investigation report in the penalty phase of a capital case.

*42 After Hutton's conviction, his trial counsel requested a presentence investigation ("PSI") pursuant to R.C. 2929.03(D)(1). The resulting report listed Hutton's criminal charges since 1967 and indicated the disposition of each charge. Two of the listed charges resulted in delinquency adjudications and five resulted in criminal convictions. One other charge resulted in probation. Six charges were listed as "Released" or "No disposition." The charges on which Hutton had just been tried were listed as "Pending." A pending rape case against Hutton was also listed.

A majority of the court of appeals agreed that Hutton's counsel had been ineffective. Judge Matia, in a part of the majority opinion not joined by any other judge, considered the mere request for a PSI to be ineffective assistance, because it brought Hutton's criminal record before the jury. Judge McManamon concurred on narrower grounds. She thought it

acceptable for counsel to request a PSI, but believed that the criminal charges not resulting in convictions or delinquency adjudications were irrelevant and highly prejudicial. She concluded that Hutton's counsel was ineffective because he did not seek to have the assertedly irrelevant material stricken from the report. See *State v. Glenn* (1986), 28 Ohio St.3d 451, 459–460, 28 OBR 501, 508, 504 N.E.2d 701, 710.

A

The state's second proposition of law asserts that the court of appeals erred by holding that Hutton's counsel rendered ineffective assistance in the sentencing phase.

Allegations of ineffective assistance of counsel are considered in two parts. First, the reviewing court must determine whether the challenged act or omission fell below an objective standard of reasonableness. Second, it must decide whether the defendant was prejudiced. To prevail, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result would have been different. ****441** *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Id.* at 689, 104 S.Ct. at 2065. Especially on direct appeal, that presumption is not easily overcome. The record does not show counsel's thought processes, nor does it show a failure to "make reasonable investigations * * *." *Id.* at 691, 104 S.Ct. at 2066.

It may be, for instance, that counsel conducted a diligent investigation, but was simply unable to find substantial mitigating evidence. In such circumstances, an attorney might logically decide to take the chance that a PSI may produce something he had missed, even at the risk of disclosing his client's criminal record. Since the record does not rebut the presumption that counsel performed reasonably, we cannot hold that counsel's mere request for a PSI was ineffective assistance.

B

The court of appeals concluded that defense counsel should have had Hutton's arrest record excised from the PSI because the General Assembly intended that arrests not leading to criminal convictions or delinquency adjudications not come before the jury in a capital case. R.C. 2929.04(B)(5) specifically lists as a mitigating factor the lack of a significant history of convictions and delinquency adjudications. Since convictions and delinquency adjudications are specifically mentioned in R.C. 2929.04, while arrests are not, the majority concluded that arrests are not relevant to capital sentencing.

***43** However, the statute requires that a PSI be made if the defendant requests it "pursuant to section 2947.06 of the Revised Code. * * * " R.C. 2929.03(D)(1). Neither R.C. 2929.03 nor 2947.06 states what information shall be included in the PSI. Had the General Assembly wished to exclude arrests from the PSI, it could have said so. We conclude that the statute leaves the matter in the sound discretion

of the trial judge, as governed by the Rules of Criminal Procedure.

Crim.R. 32.2(B) requires that the report "shall state the defendant's prior criminal record * * * " as well as "such information about defendant's social history * * * as may be helpful in imposing or modifying sentence * * *."

We recently held that the concept of "social history" is broad enough to include allegations of wrongdoing even though the wrongdoing did not result in criminal charges. *State v. Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895, 914. Surely the arrests reported in Hutton's PSI were at least as much a part of his social history as the allegations involved in *Cooey*. As arrests, they are part of his "prior criminal record" as well.

A presentence investigation report in a capital case may include the defendant's arrest record. It follows that counsel's failure to seek its exclusion was not professionally unreasonable. We sustain the state's second proposition of law.

C

The state's fifth proposition of law argues that the prosecutor did not commit misconduct in his penalty phase closing argument when he discussed Hutton's arrest record.

The prosecutor devoted a large part of his argument to Hutton's criminal record as it appeared in the PSI. He read each item to the jury. Discussing the first two charges on Hutton's record, he said, "Both times he was released. Caught a couple of breaks." Discussing another charge, he

said: "Again he gets a release * * *. How many times do they have to pat this guy on the back?"

The prosecutor also said:

"He is found guilty in '78 of voluntary manslaughter, felonious assault, weapons disability and abduction. Sentenced again. * * * He appeals the conviction and everything except for the weapons disability charge is reversed by the Court of Appeals and there is no further prosecution. He gets paroled again."

**442 The court of appeals thought it impermissible for the prosecutor to discuss "charged offenses which did not result in convictions * * *." But if the offenses were properly included in the PSI, the prosecutor had a right to discuss them, for "once lawfully inserted into the sentencing considerations, such information is subject to fair comment by both parties." *State v. Greer* (1988), 39 Ohio St.3d 236, 253, 530 N.E.2d 382, 402.

However, there was no evidence in the PSI or elsewhere in the record that the previous convictions had been reversed on appeal. An attorney may not allude in argument to matters outside the scope of the evidence. *State v. Smith* (1984), 14 Ohio St.3d 13, 14 OBR 317, 470 N.E.2d 883. Thus, as the court of appeals held, the prosecutor erred in telling the jury that the prior convictions had been reversed.

The defense did not object to the prosecutor's improper remarks. The state, while not specifically addressing the references to the previous reversal, contends that none of the remarks made by the

prosecutor during this argument, however improper they may have been, constituted plain error.

When error is not objected to at *44 trial, a reviewing court may take notice of it if it constitutes plain error. Plain error analysis looks to whether "* * * but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

By emphasizing the "breaks" Hutton received, the prosecutor apparently sought to suggest that Hutton had committed crimes and gotten away with them. Such argument could have distracted the jury from its proper task: deciding what punishment Hutton deserved for murdering Mitchell. After hearing about the crimes Hutton had supposedly gotten away with, the jury may have wanted to punish him for those crimes as well. Thus, the prosecutor's statement was potentially prejudicial.

On the other hand, the evidence in mitigation was meager, consisting mainly of Hutton's protestations of innocence. The PSI also mentioned that Hutton's father had died and that his stepfather abandoned his family when Hutton was a child.

Given the sparseness of the mitigating evidence, we cannot say that it is *clear* that the outcome of the penalty phase would have been different but for the unobjected-to statements. The state's fifth proposition of law is therefore sustained.

III

The various opinions in the court of appeals seem to have confused the parties as to the precise grounds upon which the court of appeals reversed the trial court's judgment. Judge Matia's opinion reached conclusions adverse to the state on six issues, three of which we have already discussed. However, Judge McManamon specifically disagreed with Judge Matia on the three remaining issues, which correspond to the state's third, fourth, and sixth propositions of law in this court. Thus, the lead opinion's discussion of those issues represented only the views of its author.

Because the state prevailed on these issues in the court of appeals, and Hutton did not cross-appeal on them, they are not properly before us. Since we conclude that the majority of the court of appeals decided them correctly in the state's favor, they would not affect our disposition of this appeal in any event.

IV

In Hutton's sixth proposition of law on cross-appeal, he argues that the trial court erred by removing a juror, between the guilt and penalty phases, and replacing her with an alternate.

On January 29, 1986, the jury convicted Hutton of the charges against him. As the jurors left the courtroom, the trial judge noticed that juror Pemberton was "crying and seemingly overwrought * * *." The judge thereupon conferred in chambers **443 with Pemberton and the attorneys for both parties.

Pemberton "indicated * * * that there were a number of things that bothered her and suddenly seemed to overwhelm her." She mentioned that "a minor child was ill at home and needed her attention," that she was not receiving her regular salary while on jury duty, that continued service would cause her to miss a planned vacation, "and some other matters all of a personal nature." She was "visibly * * * and violently shaking, and in the Court's lay opinion she was highly upset." The court, over defense objection, replaced Pemberton with an *45 alternate juror and sent Pemberton home. The alternate sat through the penalty phase and participated in all subsequent deliberations.

First, Hutton argues that the trial court excused Pemberton without adequate cause. One of the trial court's reasons for excusing Pemberton was that she had a sick child at home. "[T]he discharge of an individual juror for illness of an immediate member of his family during any stage of a criminal trial is within the sound discretion of the trial court * * *." *State v. Sallee* (1966), 8 Ohio App.2d 9, 11, 37 O.O.2d 5, 6, 220 N.E.2d 370, 371.

Moreover, her son's illness and the other circumstances upset Pemberton so badly that she was crying and "violently shaking. * * * " Crim.R. 24(F) allows the court to replace jurors who " * * * become or are found to be unable or disqualified to perform their duties. * * * " See *State v. Shields* (1984), 15 Ohio App.3d 112, 119, 15 OBR 202, 210, 472 N.E.2d 1110, 1118; *State v. Hopkins* (1985), 27 Ohio App.3d 196, 27 OBR 235, 500 N.E.2d 323. We do not find that, in excusing Pemberton, the trial court abused its discretion. See *State v. Greer, supra,*

at 248, 530 N.E.2d at 397 (juror who during voir dire exhibited "considerable emotional difficulty" with recommending death penalty was "unsuitable" to serve as a juror).

Second, Hutton argues that, when a trial court replaces a juror with an alternate after the guilt phase but before the penalty phase, the defendant is denied his statutory right to have the penalty recommendation made by "the trial jury" as required by R.C. 2929.03(C)(2)(b) and (D)(2).

We have held that "the decisions leading to a death sentence must be made by the same jury that convicted the offender in the guilt phase. * * * " *State v. Penix* (1987), 32 Ohio St.3d 369, 373, 513 N.E.2d 744, 748. Hutton maintains that, where the twelve jurors voting on a penalty are not the same twelve who voted on guilt, the penalty decision has not been made by "the same jury that convicted the offender * * *." However, R.C. 2929.03 speaks of "the trial jury * * *." We hold that the "trial jury" consists of all the jurors, including any properly substituted alternates.

Our interpretation is consistent with the reasons for using "the trial jury" to recommend the sentence. In *Lockhart v. McCree* (1986), 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137, the United States Supreme Court, holding that using the same jury in both phases is constitutional, identified two legitimate state interests in that practice. First, a capital defendant "might benefit at the sentencing phase * * * from the jury's 'residual doubts' about the evidence presented at the guilt phase. * * * " *Id.* at 181, 106 S.Ct. at 1769. Second, "in most, if not all,

capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase * * *." *Id.*

Alternate jurors are selected in the same way as regular jurors and hear the same evidence. Since they see and hear the trial, they are as capable as regular jurors of considering the evidence admitted in the guilt phase, and quite as likely to entertain "residual doubts" and weigh them in the defendant's favor. By contrast, in *Penix, supra,* after the court of appeals had vacated the death penalty, the state sought a new penalty hearing with entirely new jurors who had played no part in the guilt phase. The evidence presented at the guilt phase would necessarily have to be presented again. " * * * Such repetitive trials could not be consistently fair to the State and perhaps not even to the accused." ****444** *Rector v. State* (1983), 280 Ark. 385, 396, 659 S.W.2d 168, 173. ***46** This, for us, suffices to distinguish *Penix.*

Finally, Hutton argues that the trial court should have discharged the alternates as soon as the jury retired to consider guilt or innocence, as required by Crim.R. 24(F).

Crim.R. 24(F) provides:

" * * * Alternate jurors * * * shall replace jurors who, prior to the time the jury *retires to consider its verdict,* become or are found to be unable or disqualified to perform their duties. * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. * * * " (Emphasis added.)

Crim.R. 24(F) reflects the general rule that, after the jury retires to deliberate, alternates may not replace regular jurors. See, *e.g.*, *State v. Locklear* (1978), 61 Ohio App.2d 231, 15 O.O.3d 369, 401 N.E.2d 457; *United States v. Lamb* (C.A.9, 1975), 529 F.2d 1153; *People v. Burnette* (Colo.1989), 775 P.2d 583; *People v. Ryan* (1966), 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710.

However, few cases have considered how this general rule applies to the unique context of a bifurcated trial. One such case is *State v. Dodis* (Minn.1982), 314 N.W.2d 233. In *Dodis*, a murder defendant raised the defense of mental illness. Under Minnesota law, his trial was bifurcated into a guilt phase and a mental illness phase. Between phases, an alternate replaced a regular juror.

This procedure was upheld because "there were, in effect, two separate trials on two distinct issues. * * * " *Dodis, supra,* at 241. The alternate's absence from deliberations on guilt was "of no consequence" to his ability to deliberate on mental illness, because "the finding of proof of the elements of the crime is an accepted fact, not to be attacked collaterally. * * * " *Id.* See, also, *Shreeves v. United States* (D.C.App.1978), 395 A.2d 774, overruled in part on other grounds, *Dew v. United States* (D.C.App.1989), 558 A.2d 1112, 1116, fn. 3.

The court of appeals applied similar logic here, reasoning that the substitution was proper because "[i]n a capital case, there are two separate trials. * * * " (Emphasis omitted.) Such reasoning does not, however, fully apply to a capital case. The issues of guilt and penalty are not wholly "distinct,"

as were the issues in *Dodis, supra;* rather, they are necessarily "interwoven." *Rector, supra,* 280 Ark. at 395, 659 S.W.2d at 173. Moreover, the capital defendant may attack the finding of guilt during the penalty phase. See, *e.g., State v. Gillard* (1988), 40 Ohio St.3d 226, 234–235, 533 N.E.2d 272, 281; *State v. Buell* (1986), 22 Ohio St.3d 124, 142, 22 OBR 203, 218–219, 489 N.E.2d 795, 811.

This was recognized in *People v. Fields* (1983), 35 Cal.3d 329, 197 Cal.Rptr. 803, 673 P.2d 680. The defendant there argued that it was unconstitutional to remove prospective jurors who would automatically vote against the death penalty, but could still impartially decide guilt. He proposed that such jurors sit on the jury in the guilt phase and yield to alternate jurors for the penalty phase.

Rejecting this approach, the *Fields* court noted that an alternate who joined the jury for the penalty phase " * * * would be joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty * * * and may have arrived at tentative conclusions * * *." *Id.* at 351, 197 Cal.Rptr. at 817, 673 P.2d at 693. An alternate would be "ignorant of those discussions and conclusions," ***47** *id.,* and might find it difficult to affect the thinking of the others. His situation would be similar to that of an alternate who joined the jury in the midst of its deliberations on guilt.

On the other hand, although the issues determined in the guilt phase overlap with those determined in the penalty phase, they are ultimately different issues. In the guilt phase, the jury's

essential task is to make determinations of fact and apply the law to the facts it finds. In the penalty **445 phase, the jury is asked to make "a moral inquiry into the culpability of the defendant * * *." *California v. Brown* (1987), 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (O'Connor, J., concurring).

In making that moral inquiry, the jury hears evidence and arguments that it would not have been permitted to hear in the guilt phase. Here, for instance, a PSI was admitted. The information it contained would have been largely irrelevant to the question of guilt or innocence. As we observed earlier this term:

" * * * Although the issue of guilt or innocence is relevant to sentencing * * *, it is not the only issue in the penalty phase, as it is in the guilt phase. * * * [A] defendant can avoid the death penalty even though the trier of fact does not doubt his guilt at all." *State v. Tyler* (1990), 50 Ohio St.3d 24, 40, 553 N.E.2d 576, 594–595. With regard to the evidence and arguments adduced in the penalty phase, an alternate juror who was present throughout the trial and during the whole of the penalty deliberations would be able to take as full and productive a part in those deliberations as any of the original jurors. The substitution "does not change the character of the jury. * * * " *People v. Green* (1971), 15 Cal.App.3d 524, 528, 93 Cal.Rptr. 84, 86. Thus, the *Fields* court "recognize[d] that unforeseen circumstances may require substitution of a juror at the penalty phase of a capital trial, even though the alternate did not take part in the guilt phase deliberations. * * * " *Fields*,

supra, at 351, 197 Cal.Rptr. at 817, 673 P.2d at 693, fn. 9, citing *Green, supra.*

Another factor that persuades us that Crim.R. 24(F) was not meant for this situation is that the consequences of its application would be decidedly more severe than when it is applied in the guilt phase. If a juror becomes ill or is otherwise disqualified after the jury has begun its deliberations on guilt or innocence, a mistrial results; the state, however, may then retry the defendant. *Pfeffer v. State* (Tex.App.1984), 683 S.W.2d 64; *People v. Loving* (1977), 67 Cal.App.3d Supp. 12, 136 Cal.Rptr. 851. But if the juror is excused after the verdict but before the jury begins to deliberate on the sentence, the case would be over. The deliberations could not go forward without a full complement of twelve jurors. Nor could the court impanel a new jury of twelve, since no defendant can be sentenced to death on the recommendation of a jury other than the trial jury. *Penix, supra.* Thus, to adopt Hutton's view would completely foreclose the state from obtaining the death penalty.

It has been suggested that, if alternates were allowed to replace regular jurors after the jury retired to deliberate, jurors in the minority might fake illness in order to be replaced and thereby escape the emotional pressures of holding out against the majority. See *Lamb, supra,* at 1156. Hutton attempts to apply that reasoning to the situation in this case. He suggests that Pemberton may simply have wanted to avoid the difficult choice between life and death that would have faced her in the penalty phase. However, we agree with those commentators *48 who consider the possibility of malingering

unduly speculative, see Note (1981), 57 Notre Dame L.Rev. 137, 148; unrealistic, see Comment (1982), 31 Am.U.L.Rev. 651, 670–671; and inconsistent with the familiar presumption that jurors obey the court's instructions, *id.*

Crim.R. 24(F) is not violated in a capital case where an alternate juror is substituted for another juror after the guilt phase verdict, but before deliberations begin in the penalty phase. Accordingly, Hutton's sixth proposition of law on cross-appeal is overruled.

V

In his third proposition of law on cross-appeal, Hutton argues that he was prejudiced by gruesome photographs of Derek Mitchell's rotting corpse. The photographs at issue are State's Exhibits 16 to 19, which show Mitchell's body in the coroner's office, and 26 to 34, which show where the body was found.

We note that Exhibits 32 to 34 do not show "actual bodies or body parts [,]" *State v. DePew* (1988), 38 Ohio St.3d 275, 281, 528 N.E.2d 542, 550, and having examined ****446** them, we cannot accept Hutton's characterization of them as "gruesome."

The remaining photographs are indeed macabre. They are also probative. The extreme decomposition of the body explained why the coroner could not fix the time of death and why he could not find an entry wound for the bullet located in Mitchell's chest. See *State v. Benner* (1988), 40 Ohio St.3d 301, 311, 533 N.E.2d 701, 712–713, fn. 3. State's Exhibit 31, which shows the skin sloughing off Mitchell's left foot, also shows that he had no shoe on that foot. This helped

to identify the body as Mitchell's because a left shoe was found in the same area as the body and Mitchell's sister and wife both identified it as Mitchell's shoe.

State's Exhibits 28 and 29 show the tire on the body. The tire tends to show that Hutton was the killer. As the prosecution noted at trial, Hutton had accused Mitchell of stealing tires from Hutton's back yard. The prosecutor, with these words, suggested that Hutton placed the tire on the body as an ironic gesture: "What was laying [*sic*] on top of Ricky Mitchell? A tire. * * * You want some tires, sucker, well here is one for you. * * * " We find that the probative value of the photographs outweighs the potential they present for prejudice.

Although the photographs were probative, they were also unnecessarily repetitious. For instance, State's Exhibits 17, 18, and 19 simply depict the same subject from different angles.

However, only eight gruesome photographs were used, of which only four were arguably repetitious. Moreover, challenged relevant evidence "should be viewed in a light most favorable to the proponent * * *, maximizing its probative value and minimizing any prejudicial effect * * *." *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, 15 OBR 379, 402, 473 N.E.2d 768, 792. Given the unquestionable probative value of the photographs, and the minimal number used, we find the repetition harmless. Thus, Hutton's third proposition of law is overruled.

VI

In his seventh proposition of law, Hutton argues that his trial counsel was ineffective in four ways.

First, he complains that his counsel failed to investigate possible mitigating evidence. As we observed, however, the record does not show what investigations counsel did or did not make. Since it is Hutton's burden ***49** to show that his counsel's performance was deficient, his claim lacks merit.

Moreover, Hutton relies on the testimony his lawyer introduced in the guilt phase to show that potential mitigating evidence existed. He asserts that there had been testimony as to his good reputation, his intelligence, and "the fact that he was attending school in Indianapolis in order to improve his auto repair business." But the introduction of that testimony suggests that Hutton's lawyer did investigate the matters testified to. And since the jury had heard the testimony in the guilt phase, we think it a plainly reasonable exercise of professional judgment not to repeat the same testimony in the penalty phase.

Second, Hutton complains that his lawyer failed to object to the firearm specification's inclusion in the indictment and its submission to the jury during the guilt phase. However, the jury was not instructed that the firearm specification was an aggravating circumstance. Cf. *State v. Johnson* (1986), 24 Ohio St.3d 87, 24 OBR 282, 494 N.E.2d 1061.

Third, Hutton complains that his lawyer did not object to the prosecutor's reading his juvenile record to the jury. However, the record was part of the PSI,

and therefore subject to fair comment by the prosecutor. Merely reading excerpts from the PSI to the jury was not objectionable.

Finally, Hutton's lawyer did not object to the trial court's statement that the jury would "recommend" a sentence. This, of course, was a completely correct statement of law, as we reaffirm *infra,* and was in no way objectionable.

**447 Since we find no merit in any of Hutton's claims of ineffective assistance, his seventh proposition of law is overruled.

VII

In Hutton's first proposition of law on cross-appeal, he sets forth nine reasons the Ohio statutes governing the death penalty are unconstitutional. We have rejected each of his arguments. See *State v. Jenkins* (1984), 15 Ohio St.3d 164, 167–179, 15 OBR 311, 314–324, 473 N.E.2d 264, 272–281, and paragraphs two and eight of the syllabus; *State v. Mapes* (1985), 19 Ohio St.3d 108, 117, 19 OBR 318, 325, 484 N.E.2d 140, 148; *State v. Scott* (1986), 26 Ohio St.3d 92, 109, 26 OBR 79, 93–94, 497 N.E.2d 55, 69; *State v. Zuern, supra,* 32 Ohio St.3d at 63–64, 512 N.E.2d at 592–593. This proposition of law is summarily overruled. *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568.

In his fourth proposition of law, Hutton complains that the trial court instructed the jury in the penalty phase as follows: "You must not be influenced by any consideration of sympathy or prejudice." The instruction of which this language was a part was approved in *Jenkins, supra,* 15 Ohio St.3d at 191–

192, 15 OBR at 334–335, 473 N.E.2d at 290–291. See, also, *State v. Steffen* (1987), 31 Ohio St.3d 111, 125, 31 OBR 273, 285, 509 N.E.2d 383, 396. More important, the instruction was not even given in the penalty phase. Contrary to Hutton's contention, it was given only in the guilt phase, where it was incontestably proper. Accordingly, this proposition of law is overruled.

In Hutton's fifth proposition of law on cross-appeal, he argues that it was unconstitutional to instruct the jury that a decision to impose the death penalty was a mere recommendation, while a decision to impose a life sentence would be binding. Having repeatedly rejected this argument, see, *e.g.*, ***50** *State v. Hicks* (1989), 43 Ohio St.3d 72, 79–80, 538 N.E.2d 1030, 1038–1039, we summarily overrule this proposition of law.

VIII

In its seventh proposition of law, the state argues that the court of appeals erred by not engaging in independent review of the sentence as required by R.C. 2929.05(A).

The court of appeals reserved judgment on the proportionality and appropriateness of the death sentence because, if its judgment were affirmed, a new trial would be required. That would leave the trial court "* * * in the uncomfortable position of trying a case calling for possible capital punishment wherein an appellate court had in fact * * * found that the imposition of capital punishment was warranted."

The state observes that R.C. 2929.05(A) requires reviewing courts to "review the sentence of death *at the same time* that they review the other issues in the case. * * * " (Emphasis added.) According to the state, we should now conduct our own independent review instead of remanding to the court of appeals.

However, to do as the state suggests would deny Hutton his statutory "right to independent review by both the intermediate appellate court and the Supreme Court." *Gillard, supra,* 40 Ohio St.3d at 235, 533 N.E.2d at 281; R.C. 2929.05(A). This safeguard "eliminates the arbitrary imposition of the death penalty. * * * " *Glenn, supra,* 28 Ohio St.3d at 453, 28 OBR at 502, 504 N.E.2d at 705, quoted in *Gillard, supra.* Therefore, in reversing the judgment of the court of appeals, we must remand this cause to that court for its independent review.

In Hutton's second proposition of law, he argues that the sentence of death is disproportionate to the sentences imposed in similar cases. Again, we decline to pass on this issue until the court of appeals has completed its review.

The judgment of the court of appeals is reversed. This cause is remanded to the court of appeals for independent review of the sentence. On remand, the court of appeals must weigh the aggravating circumstances as well as the mitigating factors, and determine, as required by R.C. 2929.05(A), whether the aggravating circumstances **448 outweigh the mitigating factors and whether the sentence of death is the appropriate sentence in this case.

Judgment reversed and cause remanded.

DOUGLAS and RESNICK, JJ., concur.

HOLMES, J., concurs in the syllabus and judgment only.

SWEENEY, WRIGHT and HERBERT R. BROWN, JJ., concur in part and dissent in part.

HERBERT R. BROWN, Justice, concurring in part and dissenting in part.

I concur in the syllabus law, and in the majority's holding that the defendant Hutton was properly convicted. However, because the sentencing phase of the trial was marred by a plain error in the jury instructions, I must respectfully dissent from the remand for review of the death sentence.

A criminal defendant has a right to expect that the trial court will give complete and correct jury instructions. *State v. Williford* (1990), 49 Ohio St.3d 247, 251, 551 N.E.2d 1279, 1283. The trial court's instructions to the ***51** jury[2] correctly explained that

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[2] The full text of the jury instructions is as follows:

"THE COURT: Ladies and gentlemen, you have now heard all the evidence and the arguments of counsel, and you will now decide whether you will recommend to the Court that the sentence of death shall be imposed upon the Defendant, and if not whether you will recommend that the Defendant be sentenced to life imprisonment with a parole eligibility after serving 20 full years of imprisonment, or to life imprisonment

with parole eligibility after serving 30 full years of imprisonment.

"You will consider all the evidence, arguments, statements of the Defendant, pre-sentence investigation, mental examination report, and all other information and reports which are relevant to the nature and circumstances of any mitigating factors, including but not limited to the nature and background of the Defendant, and all of the following:

"1. Whether the victim of the offense induced or facilitated.

"2. Whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation.

"3. Whether at the time of the committing of the offense the Defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirement of the law.

"4. The youth of the Defendant.

"5. The Defendant's lack of significant history of prior criminal convictions and delinquency adjudications.

"6. If the Defendant was a participant in the offense, but not the principal offender, the degree of the Defendant's participation in the offense and the degree of the Defendant's participation in the acts that led to the death of the victim.

"7. Any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

"The prosecution has the burden to prove beyond a reasonable doubt that the aggravating circumstances, of which the Defendant was found guilty, outweigh the factors in mitigation of imposing the death sentence.

"To outweigh means to weigh more than, to be more important than.

the jury was required to weigh the aggravating circumstances against the mitigating factors, and could impose a sentence of death only if the aggravating circumstances outweighed the mitigating factors. Unfortunately, the court failed to **449 tell the jury what the "aggravating circumstances" were.

Though defendant's counsel did not object at trial and the issue has not been raised on appeal, this omission is plain error. No jury (or anyone else) can

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"The existence of mitigating factors does not preclude or prevent the death sentence. If the aggravating circumstances outweigh the mitigating factors.

"You are, of course, mindful of the definition given you earlier by the Court of the phrase reasonable doubt, and I will share that with you again. Reasonable doubt is present when after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charges.

"Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral judgment is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

"You should recommend the sentence of death if you unanimously, that is all twelve of you, find proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

"If you do not so find, you should unanimously recommend either life sentence with parole eligibility after serving 20 years of imprisonment or life sentence with parole eligibility after serving 30 years of imprisonment."

weigh aggravating circumstances against mitigating factors without knowing what the aggravating circumstances are. This weighing process is the very purpose of the sentencing phase of a capital trial. Without any instruction defining "aggravating circumstances," the jury was left "with untrammeled discretion to impose or withhold the death penalty." *Gregg v. Georgia* (1976), 428 U.S. 153, 196, at fn. 47, 96 S.Ct. 2909, 2936, at fn. 47, 49 L.Ed.2d 859. This, the United States Constitution forbids.

Accordingly, I would reverse the sentence of death and remand for imposition of a life sentence pursuant to *State v. Penix* (1987), 32 Ohio St.3d 369, 513 N.E.2d 744.

SWEENEY and WRIGHT, JJ., concur in the foregoing opinion.

All Citations

53 Ohio St.3d 36, 559 N.E.2d 432, 89 A.L.R.4th 397

APPENDIX M

1988 WL 39276

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee,
v.
Percy "June" HUTTON, Defendant-Appellant.

No. 51704.
|
April 28, 1988.

Criminal appeal from Common Pleas Court No. CR-203416.

Attorneys and Law Firms

John T. Corrigan, Cuyahoga County Prosecutor, for plaintiff-appellee.

Floyd B. Oliver, Cleveland, for defendant-appellant.

JOURNAL ENTRY AND OPINION

MATIA, Judge.

***1** Defendant-appellant, Percy "June" Hutton, appeals his conviction, death sentence and other sentences for two counts of aggravated murder with gun, mass murder, and felony murder specifications; two counts of kidnapping with gun specifications; and one count of attempted murder with gun and violence specifications.

On October 16, 1985, the grand jury of Cuyahoga County returned a true bill of indictment against the appellant for: two counts of aggravated murder, one count of attempted murder, and two counts of kidnapping, all with various specifications (as enumerated above). The defendant entered a plea of not guilty to these charges at his arraignment on October 18, 1985.

The matter went to trial on January 13, 1986. The appellant was convicted of all five counts and specifications as follows:

a) one count of aggravated murder (R.C. 2903.01(A)) of Derek "Ricky" Mitchell with gun, mass murder, and felony murder specifications;

b) one count of aggravated murder (R.C. 2903.01(B)) of Derek "Ricky" Mitchell with gun, mass murder, and felony murder specifications;

c) two counts of kidnapping (R.C. 2905.01) of Derek "Ricky" Mitchell and Samuel Simmons, Jr. with gun specifications;

d) one count of attempted murder of Samuel Simmons, Jr. (R.C. 2903.02/2923.02) with gun and violence specifications.

The evidence at trial offered by the state and the defendant was frequently parallel. However, the major factual issues were vigorously disputed. We will discuss the evidence under the following two headings below.

I. *The State's Case*

The evidence at trial on behalf of the state of Ohio began with the testimony of Samuel Simmons, Jr.

Samuel Simmons, Jr. (victim number one) was to evolve in this matter as the victim of the third count of the indictment, kidnapping, and the fifth count of the indictment, attempted murder. Simmons testified that he knew the appellant nearly all of his life and commonly referred to him as a 'brother,' although they were not related. Simmons stated that in mid-September of 1985, the appellant approached Simmons regarding an allegedly stolen sewing machine which the appellant accused Simmons and Derek "Ricky" Mitchell (victim number two) of stealing. The appellant threatened to kill both Simmons and Mitchell (victim number two under the first and second counts of aggravated murder with specifications and the fourth count of kidnapping) if the appellant found out that they had anything to do with the theft of the appellant's sewing machine.

Simmons testified that the defendant and Bruce Laster (the co-defendant in this case, but not on trial in the case *sub judice*) picked Simmons up at his house in the early morning hours of Monday, September 16, 1985, ostensibly to repair a motor vehicle Simmons said the appellant wanted him to help the appellant repair. Simmons testified that he entered the back seat of appellant's Chrysler Cordoba automobile and seated himself next to a .22 caliber rifle. However, before going directly to the vehicle needing repair, the appellant, co-defendant Laster, and Simmons drove to Mitchell's house on Norman Avenue to discuss the appellant's missing sewing machine. Simmons testified that he had been told by the appellant that $750 in cash was hidden in the sewing machine. The money was to be used by

the appellant for his tuition at an auto mechanic's school in Indianapolis, Indiana.

After speaking with the appellant, Mitchell then agreed to go with the appellant, co-defendant Laster, and Simmons to talk to an unidentified man who had told the appellant that Mitchell tried to sell him a stolen sewing machine. Instead of driving to the unidentified man's house, the appellant drove to the Regional Transit Authority lot on East 93 Street. Upon arrival, the appellant ordered Mitchell out of the car and walked him to the edge of the street. Although Simmons could not hear the conversation, Simmons did see the appellant hold a handgun to Mitchell's head. Simmons remained in the car with the co-defendant Laster, who held a rifle in his hand.

*2 The appellant and Mitchell returned to the car. Then Mitchell directed the appellant to drive to East 30 Street and Community College Avenue. Mitchell entered a house and shortly thereafter motioned for the appellant to come into the house. The appellant went into the house. The appellant then returned to the car with a white sewing machine case and placed it in the trunk of the car. Mitchell also returned from the house to the appellant's car.

The appellant then drove to his mother's house on East 101 Street and Cedar Avenue and took the white colored sewing machine case into the house. The co-defendant Laster held a rifle in his hand until the appellant came out of the house.

Then they all drove up the street to an alley where the appellant stopped and pointed to a Cadillac Eldorado which Simmons claims the

appellant wanted Simmons to repair for the appellant.

After Simmons and the appellant got out of the appellant's car, the appellant then decided to move his Chrysler Cordoba away from the Cadillac Eldorado which was parked in the alley. The appellant moved his Chrysler Cordoba out of view from the alley to a point on the next street. Co-defendant Laster and Mitchell remained in appellant's automobile. Appellant then walked back to Simmons who was still standing in the alley, opened the driver's door and the hood of the car, and told Simmons to get into the car and start the car with a screwdriver. Simmons testified appellant then shot him twice in the back of the head with a handgun while Simmons was seated in the Cadillac Eldorado. Whereupon, the appellant ran down the alley to his Chrysler Cordoba on the next street. Simmons fell out of the Cadillac Eldorado onto the alley. With great difficulty, Simmons made his way up the alley and down the street to the appellant's mother's house where he banged on the door. However, no one answered the door. Simmons immediately proceeded to the next door neighbor's house, banged on the front door, and requested help. When Simmons heard the appellant drive up to the house, he ran into the backyard. The appellant repeatedly told Simmons "Come here. Come here." (Tr. 972). Simmons asked the appellant to take him to the hospital, fearing he would die without treatment. Co-defendant Laster and Mitchell were still in the appellant's auto. The wounded Simmons entered the appellant's auto whereupon the appellant, Mitchell and co-defendant Laster all drove

Simmons to St. Luke's Hospital. En route, Simmons told Mitchell that the appellant had shot him, but the appellant denied Simmons' version and said he (appellant) saw a man come out of a house in the vicinity of the Cadillac Eldorado and shoot Simmons. (Tr. 973-974). On cross-examination, Simmons testified that he did not tell Mitchell who had shot him. He also testified that he repeatedly asked Mitchell to go into the hospital with him. (Tr. 1097, 1105).

Upon arrival at St. Luke's Emergency Room, none of the occupants of the car wished to accompany Simmons into the hospital. However, Mitchell did help Simmons out of the car and guided him into the arms of a security guard who ran outside to assist Simmons. Mitchell returned to the appellant's car and thereafter, the appellant, co-defendant Laster, and Mitchell sped off. Then the appellant, co-defenant Laster, and Mitchell drove to Mitchell's house to pick up Eileen Sweeney, Mitchell's girlfriend. Ms. Sweeney had been living there with her boyfriend, Mitchell. They all drove Sweeney to St. Luke's so she could check on Simmons' condition. Sweeney testified that this was the last time she saw Mitchell alive.

***3** Simmons testified that he spoke with Sweeney at the hospital before he went into surgery. He told her "Percy Hutton is the one who shot me. Go out there and tell Ricky [Mitchell] to get out that car (sic) and come into the hospital." (Tr. 977). Sweeney rushed out of the room and Simmons didn't see her again that morning (Monday, September 16, 1985).

Eileen Sweeney testified she ran outside to the parking lot but appellant's car was gone. She waited at the hospital until the appellant returned to the hospital parking lot. The appellant and co-defendant Laster did return to the hospital but without Mitchell. Sweeney inquired of appellant as to the whereabouts of Mitchell. The appellant told her that Mitchell was at home and that he would take her there. However, instead of taking her directly home, Sweeney testified that co-defendant Laster dropped her and the appellant off at a park on Fairhill Road where the appellant raped her. Defense counsel objected prior to the introduction of the rape testimony, and after a sidebar conference, the trial court instructed the jury that they were "about to receive evidence which might tend to show that this Defendant committed other criminal acts which have not been included in this case and, therefore, are not before you [the jury] for your consideration. * * * " (Tr. 1181). The court instructed the jury to disregard any other evidence with respect to the conduct of the appellant. (Tr. 1182). Further, the trial court later cautioned the jury that the testimony was admitted for the very limited purpose of establishing continuity of the events. (Tr. 1332).

It should be noted that in a second subsequent indictment the appellant was charged with two counts of rape with specifications and one count of kidnapping Eileen Sweeney with specifications. The prosecutor moved the court prior to the trial *sub judice* to combine the second rapes-kidnapping indictment with the present indictment and to try the additional crimes of rape and kidnapping in the same proceedings with the aggravated murders,

attempted murder, and kidnapping counts. (Tr. 3). The court denied the prosecutor's request for joinder and agreed with the defendant's objections to the merger. (Tr. 6).

While at the park, the appellant threatened Sweeney with a handgun and told her "Ricky wasn't coming back" and "to forget about him." (Tr. 1265). Upon co-defendant Laster's return to the park in the auto, appellant took two rifles out of the trunk and placed them in the backseat of the car. (Tr. 1184). Appellant then drove Sweeney to her home located on Norman Avenue. Sweeney testified that the house had been ransacked while she was at the hospital and that Mitchell was not there. She asked appellant to drive her to Mitchell's grandmother's house off East 112 Street and Miles Avenue. Once there, appellant escorted her into the house and told her " * * * Ricky wasn't coming back, and if I told someone would be looking for me." (Tr. 1191). She told appellant she wouldn't tell anyone. However, upon the appellant's departure, Sweeney informed LaWanda Mitchell, the sister of Mitchell, of the events that occurred in the early hours of Monday, September 16, 1985.

Both Simmons and Sweeney reported the events of the morning of Monday, September 16, 1985 to the police. On September 30, 1985, a decomposed unidentified body was found at East 88 Street and St. Catherine Avenue. Mitchell's body was so decomposed that Mitchell's family members could not identify Mitchell's body. (Tr. 1440). However, Eileen Sweeney and LaWanda Mitchell did identify Mitchell's shoe. Later, x-rays of Mitchell's hand, taken in connection with a previous accident,

corresponded with x-rays taken at the coroner's office, and a positive identification of Mitchell was obtained.

*4 Deputy Coroner Robert Challener testified that he could not positively state how long Mitchell had been dead, but he estimated the time at approximately two weeks before the body was found. Mitchell sustained gunshot wounds to the left side of his head and to the right side of his chest.

Based on the information received from Simmons and Sweeney, the appellant was arrested on October 5, 1985. At his arraignment on October 28, 1985, appellant pled not guilty.

II. *The Defense*

The appellant presented four witnesses on his own behalf.

The first witness, Denise Richardson, testified that she saw Mitchell on the afternoon of *Tuesday,* September 17, 1985. (The testimony during the state's case was that the last time Mitchell was seen alive was on *Monday,* September 16th.) Richardson testified that on Tuesday, September 17, 1985, she saw Mitchell carrying a white sewing machine case and he asked her if she had seen the appellant or knew his whereabouts.

The second witness was Samuel Simmons, Sr. He testified that his son, Samuel Simmons, Jr.'s reputation for truthfulness was not very good. (Tr. 1848). Simmons, Sr. knew the appellant "all his life" and his reputation for truthfulness was "very good." (Tr. 1850). He testified that he went to St. Luke's Hospital to see his son on Monday, September 16,

1985 and his son said he didn't know who shot him. (Tr. 1053).

Appellant's third witness was Celeste Laster. Celeste Laster, the appellant's girlfriend and the sister of the co-defendant Bruce Laster, testified she, the appellant, and co-defendant Laster were at the appellant's mother's house on East 101 Street and Cedar Avenue when Mitchell banged on their front door in the early morning hours of Monday, September 16, 1985. She woke the appellant up while Mitchell was yelling "Sam [Simmons got shot." (Tr. 1870). She heard Simmons shouting to the appellant "Somebody shot me, man. Take me to the hospital." She said the appellant got dressed and drove Simmons and Mitchell to the hospital. The appellant returned home after 4:00 a.m., Monday, September 16, 1985. Later that morning Celeste Laster and the appellant visited Simmons at the hospital.

The appellant left for mechanic's school in Indianapolis, Indiana on Tuesday, September 17, 1985.

Appellant's fourth witness, Mary Alice Jefferson, the evening desk clerk at the Indianapolis, Indiana Y.M.C.A., testified to the fact that appellant was a resident at the Y.M.C.A. while attending mechanic's school.

Finally, the appellant took the stand and testified that Simmons and Mitchell broke into the appellant's house on Corlett Avenue and stole the upstairs neighbor's sewing machine. The appellant later saw them trying to sell a white case to a man at a store on East 101 Street and Cedar Avenue. The appellant

testified he talked to both Simmons and Mitchell and told them to return the sewing machine or he would turn them over to the police.

*5 The next time the appellant saw Simmons was on Sunday, September 15, 1985 at approximately 11:00 p.m. on East 105 Street. Simmons told the appellant Mitchell wanted to talk with him. The appellant, co-defendant Laster and Simmons drove to Mitchell's house on Norman Avenue. Mitchell told the appellant that he would take the appellant to the house where the sewing machine was located. At first, Mitchell had him drive in one direction, but asked him to turn around at the Woodhill bus station after reconsidering where the sewing machine might be located. They eventually drove down to East 30 Street and Community College Avenue. Mitchell went inside a house for ten minutes and came outside carrying a Singer sewing machine case. When the appellant went to put the case in the trunk, he realized it was not a Kenmore sewing machine, and hence was not the missing sewing machine, and he had Mitchell return it. Mitchell promised to find the one the appellant was looking for and return it later.

Appellant testified further that he had been painting all day and he was tired and exasperated with driving around looking for the sewing machine, so he and co-defendant Laster drove Simmons and Mitchell back to Mitchell's house. While driving down an alley on East 101 Street, appellant testified Simmons saw a brown Cadillac Eldorado that Simmons wanted to steal. The appellant told him to leave the Cadillac Eldorado alone. The appellant then testified that he dropped Simmons and Mitchell

off at Mitchell's residence on Norman Avenue. He and co-defendant Laster returned to the house on East 101 Street around midnight on Monday, September 16, 1985.

Later, Celeste Laster (appellant's girlfriend) woke appellant up to tell the appellant that Mitchell was banging on the door yelling that Simmons had been shot. The appellant got dressed, drove his car in front of the next door neighbor's house and saw Simmons with a sawed-off pump shotgun. The appellant then drove Simmons, Mitchell and co-defendant Laster to the hospital. He dropped Simmons off at the hospital, returned to Mitchell's and Sweeney's house on Norman Avenue and appellant, co-defendant Laster and Mitchell picked Sweeney up and drove her to the hospital to check on Simmons' condition. After taking Sweeney to the hospital, appellant and co-defendant Laster took Mitchell back to his house on Norman Avenue. Mitchell went inside the house and came back out with the sawed-off shotgun Simmons had earlier. Mitchell told the appellant that while Simmons was attempting to steal the Cadillac Eldorado, a "man just came out of nowhere" and shot Simmons. (Tr.1939). The appellant then dropped Mitchell off at East 55 Street and Outhwaite because Mitchell "knew some guys that would help him out" in seeking revenge on behalf of Simmons. (Tr. 1942).

The appellant and co-defendant Laster returned to the hospital to pick up Sweeney, who repeatedly asked him where Mitchell was. The appellant told her he dropped Mitchell off at East 55 Street. (Tr.1943). The appellant drove Sweeney back to her

and Mitchell's house on Norman Avenue and then to East 112 Street and Miles.

*6 The appellant denied owning any guns. He denied any wrongdoing with regard to rape, kidnapping, attempted murder, and aggravated murder.

As noted above, the jury found the appellant guilty of two counts of kidnapping (Simmons and Mitchell) with gun specifications, one count of attempted murder (Simmons) with gun and violence specifications, and two counts of aggravated murder (Mitchell) with gun, mass murder, and felony murder specifications. (In a separate trial for the kidnapping/rapes of Ms. Sweeney, the appellant was acquitted in a bench trial).

At the "penalty" trial, the appellant made a short unsworn statement denying any wrongdoing. A presentence probation department investigation report and psychiatric evaluation summary were prepared at the appellant's request and were before the jury during its deliberation. Specifically, the jury recommended the death penalty, and the trial judge accepted that recommendation.

On February 28, 1986 he was sentenced as follows:

To death on September 16, 1986, pursuant to his conviction of counts one and two, aggravated murder with specifications, as recommended by the jury;

To three years actual incarceration regarding the gun specifications in counts one and two;

To ten to twenty-five years for the fifth count, attempted murder; and

To three years actual sentence regarding the gun specification in the attempted murder charge.

The court found that counts three and four with regard to kidnapping were crimes of similar import and they were therefore merged with the offenses of aggravated murder and attempted murder. No ruling was made by the court whether the terms of incarceration were to be served concurrently or consecutively.

Appellant appeals to this court and assigns fourteen assignments of error.

III. *The Appellant's Assignment of Error*

Appellant's assignments of error numbers I, II, V, IX and X, have all been considered and rejected on appeal in Ohio's heretofore reviewed capital cases. The appellant has cited numerous assignments of error asserted in these prior capital cases in his appellate brief. This entire opinion is based principally on the following cases concerning the Capital Punishment Act: *State v. Jenkins* (1984), 15 Ohio St.3d 164 and its progeny; *State v. Mapes* (1985), 19 Ohio St.3d 108; *State v. Martin* (1985), 19 Ohio St. 3d 122; *State v. Williams* (1986), 23 Ohio St.3d 16; *State v. Scott* (1986), 26 Ohio St.3d 92; *State v. Zuranski* (Dec. 11, 1986), Cuyahoga App. No. 50447, unreported.

Assignment of Error No. 1

"I. DEATH QUALIFICATION OF THE GUILT PHASE JURY IN A CAPITAL CASE VIOLATES THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ART. I SECTIONS 2 AND 10 OF THE OHIO CONSTITUTION."

-Death Qualification-

Appellant contends that the process of "death qualifying" a jury violated his constitutional rights in that:

*7 "A. Death qualification results in a conviction-prone jury.

"B. Death qualification results in a jury not drawn from a fair cross-section of the community.

"C. The death qualification process itself prejudiced the defendant.

"D. Death qualification violates the equal protection clause."

It is the appellant's position that jury selection in a capital case results in "death qualification." Death qualification is defined by the appellant as the effective exclusion of jurors opposed to the imposition of capital punishment.

The appellant's first assignment of error has four thrusts as enumerated above. All have been heretofore addressed. On appeal, this assignment of error has never been well taken. See *Jenkins, Mapes, Martin, Williams, Scott, Zuranski, supra.*

The appellant correctly argues that the Ohio Supreme Court is not in harmony with the decision of the United States Court of Appeals for the Eighth Circuit in *Grigsby v. Mabry* (1985), 758 F.2d 226. *Grigsby,* however, *has been reversed* by the United States Supreme Court *sub nom. Lockhart v. McCree* (1986), 90 L.Ed.2d 137.

In *Lockhart, supra,* at p. 149, the Supreme Court said "Death-Qualification" is a system that is:

" * * * carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."

This first assignment of error is not well taken.

Assignment of Error No. II

"II. IMPOSITION OF THE DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I SECTIONS 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION."

-Statutory Unconstitutionality-

This assignment of error comprises the following nine sub-arguments:

"A. Infliction of the death sentence necessarily violates the defendant's due process rights.

"B. Revised Code, Section 2929.022, Section 2929.03 and Section 2929.04 violate defendant's

rights to effective assistance of counsel and to trial before an impartial jury.

"C. Revised Code Section 2929.03, Section 2929.04 and Section 2920.04 are unconstitutional as they fail to provide adequate guidelines for deliberation, leaving the jury without proper guidelines in balancing the aggravating and mitigating circumstances.

"D. Ohio Revised Code Section 2929.022, Section 2929.03 and Section 2929.04 and Ohio Rule of Criminal Procedure 11(C)(3) place an unconstitutional burden on the defendant's right to a jury trial.

"E. Ohio Revised Code Section 2929.03 fails to provide a meaningful basis for distinguishing between life and death sentences.

"F. The appellate review provision of Section 2929.05 fails to specifically require inquiry and findings regarding arbitrariness, passion, or prejudice.

"G. The Ohio death penalty statute impermissibly mandates imposition of the death penalty and precludes a mercy option in the absence of mitigating evidence or when aggravating circumstances outweigh mitigating factors.

***8** "H. The Ohio death penalty scheme permits imposition of the death penalty on a less than adequate showing of culpability by failing to require a conscious desire to kill, premeditation, or deliberation as the culpable mental state.

"I. The statutes fail to require proof beyond all doubt as to guilt and conviction before the death sentence may be imposed."

Again the appellant asserts assignments of error frequently argued. See *Jenkins, Martin, Williams, Scott, Zuranski, supra; State v. Buell* (1986), 22 Ohio St.3d 124; and *State v. Brooks* (1986), 25 Ohio St.3d 144. In all of these cases, *the unconstitutionality of the Capital Punishment Act was rejected.* Most recently this assignment of error was raised in *Zuranski, supra,* and again rejected.

In *Jenkins,* the Supreme Court of Ohio stated at p. 179,

"* * * we hold that Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981 * * * does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution."

The second assignment of error is not well taken.

Assignment of Error No. V

"V. THE TRIAL JUDGE ABUSED HIS DISCRETION BY ALLOWING INTO EVIDENCE A SERIES OF GRUESOME PHOTOGRAPHS WHICH CONTAINED LITTLE PROBATIVE VALUE, THEREBY DENYING APPELLANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL."

-Gruesome Photographs-

In his fifth assignment of error, appellant argues that the court erred when it received into evidence gruesome photographs of the body of the victim, Mitchell, which could only inflame the jury.

In *State v. Maurer,* (1985), 19 Ohio St.3d 108, the Supreme Court of Ohio held at p. 264 that "the admission of photographs is left to the sound discretion of the trial court." The *Maurer* court further stated, at p. 266:

"Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if *relevant* and of *probative value in assisting the trier of fact to determine the issues* or are *illustrative to testimony and other evidence,* as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number. (Emphasis added)."

Once again the appellant's fifth assignment of error has been considered on appeal in other cases. They are *Martin, Mapes, Maurer, Zuranski, supra.* This assignment of error was rejected in these and other cases on review.

In the case *sub judice,* the trial court did not abuse its discretion by receiving into evidence photographs which were relevant and probative of the circumstances surrounding the death of Mitchell. The photographs were illustrative of the testimony given by various state witnesses and were not repetitive nor cumulative in number.

Appellant's fifth assignment of error is without merit.

Assignment of Error No. IX

***9** "IX. THE TRIAL JUDGE ERRONEOUSLY INSTRUCTED THE JURY TO EXCLUDE CONSIDERATION OF BIAS, PREJUDICE OR SYMPATHY FOR THE ACCUSED THEREBY DEPRIVING APPELLANT OF EVIDENCE IN MITIGATION AND CONSIDERATION OF THAT MITIGATION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION ART. I SECTIONS 9 AND 16."

-Bias, Sympathy and Prejudice-

Appellant's ninth assignment of error has been reviewed in the following cases: *Jenkins, Johnson, Williams, Scott, Zuranski, supra.* It was rejected in these cases.

In a capital case, this issue was first addressed in *State v. Jenkins, supra.* In that case the Supreme Court of Ohio held at p. 192:

"The instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute *as opposed to the individual juror's personal biases or sympathies.* We believe the instruction adequately conveys this purpose by using the term

'sympathy' together with the terms 'bias' and 'prejudice.' When read in conjunction with a correct instruction as to mitigation, as was the case here, the jury is directed to focus on the *guidelines set forth by statute.*

"We think this direction is necessary and entirely consistent with the view expressed by the United States Supreme Court in *Barclay v. Florida, supra,* at 1144, that, *'[t]he thrust of our decisions on capital punishment has been "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens,* ---U.S. ----, * * * 77 L.Ed.2d 235 * * * (1983), quoting *Gregg v. Georgia,* 428 U.S. 153, 189 * * * (1976) (opinion of Stewart, Powell and Stevens, J.J.).' " (Emphasis added)

In the case *sub judice* the trial court charged the jury:

"You must not be influenced by any consideration of sympathy or prejudice.

"It is your duty to carefully *weigh* the evidence to decide all disputed questions of fact, to apply the instructions of the court to your findings, and to render your verdict accordingly.

"In fulfilling your duties, your efforts must be to arrive at a just verdict, considering all of the evidence, arguments, and make your findings with intelligence and impartiality, and *without bias, sympathy or prejudice* so that both the State of Ohio and the defendant will feel that their case was fairly and impartially tried." (Tr. 2318-2319). (Emphasis added).

This instruction is identical to that given in *Jenkins, supra,* and other capital cases heretofore reviewed by our Supreme Court wherein it was approved. It is an accurate statement of the law and a precise instruction to the jury.

As in *Jenkins,* the trial court's instruction with regard to the exclusion of bias, prejudice, or sympathy, was properly given subsequent to the "guilt/innocence" deliberation of the jury and prior to the juries "penalty" deliberations. Said instruction was given in accordance with *Jenkins.*

The statutory structure for the jury's consideration of the criteria for imposing death or imprisonment for a capital case is set forth in R.C. 2929.04.

***10** Subsection (A) establishes the eight criteria (aggravating circumstances) for which the death penalty can be imposed.

Subsection (B) establishes the seven mitigating factors which must be found by a jury in order to mitigate against or preclude the imposition of capital punishment. Subsection (B) reads as follows:

"(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and provided beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, *the* court, *trial jury,* or panel of three judges *shall*

consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and the circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death." (Emphasis added).

The predicate of subsection (B) is that

" * * * the * * * trial jury * * * *shall consider, and weigh* against the aggravating circumstances proved

beyond a reasonable doubt the nature and circumstance of the offense, the history, the character, and background of the offender, and all of the following factors: * * *." R.C. 2929.04(B). (Emphasis added).

For the jury to include consideration of bias, prejudice or sympathy during its deliberations flies in the face of the legislature's mandate that the jury " * * * *consider, and weigh* against the aggravating circumstance the statutory mitigating factors." (See R.C. 2929.04 above).

By this assignment of error IX, the appellant asserts a frequently heretofore raised assignment of error in capital cases. See *Jenkins, Williams, Scott,* and *Zuranski, supra.* All of these cases rejected this assignment of error.

The appellant's ninth assignment of error is not well taken.

Assignment of Error No. X

*11 "X. THE TRIAL COURT AND THE PROSECUTOR INSTRUCTED THE JURY THROUGHOUT THE TRIAL THAT THEIR DECISION IN THE PENALTY PHASE IS ONLY A RECOMMENDATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I SECTIONS 9, 10 AND 16 OF THE OHIO CONSTITUTION."

-Jury Recommendation of "Punishment"-

Appellant's tenth assignment of error has been frequently asserted as an assignment of error in previous capital cases. See *Jenkins, Williams, Scott* and *Zuranski, supra.* In a rather thorough discussion of this assignment of error, this court in *Zuranski, supra,* addressed itself to this issue. The *Zuranski* court quoted R.C. 2929.03(D)(2) and noted that the word 'recommend' appears in that section of the code five times.

R.C. 2929.03(D)(2) provides as follows:

"(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall *recommend* to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall *recommend* that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"If the trial jury *recommends* that the offender be sentenced to life imprisonment with parole eligibility

after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence *recommended* by the jury upon the offender. If the trial jury *recommends* that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section." (Emphasis added).

This issue was first addressed in *Jenkins, supra,* and the trial court's instruction was approved therein. Similarly, as noted above, when the issue was raised in the other capital cases, the jury "recommendation of punishment" assignment of error was not well taken.

Appellant's tenth assignment of error is not well taken.

In light of the evidence and other appropriate reasons, assignments of error VIII, XI, XII and XIV are deserving of review and discussion, but are not well taken.

Assignment of Error No. VIII

"VIII. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR ACQUITTAL, WHICH DENIED HIM DUE PROCESS OF LAW, AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

-Crim.R. 29(A) Motion-

***12** Here, the appellant argues regarding the sufficiency of the evidence.

Crim.R. 29 (Motion for Acquittal) provides as follows:

"(A) Motion for Judgment of Acquittal. *The court* on motion of a defendant or on its own motion, after the evidence on either side is closed, *shall order* the entry of a *judgment of acquittal* of one or more offenses charged in the indictment, information, or complaint, *if the evidence is insufficient to sustain a conviction of such offense or offenses.*" (Emphasis added).

The appellant contends that the prosecutor failed to produce sufficient evidence to support each and every element of the offenses of aggravated murder, attempted murder, and kidnapping.

For the most part, appellant's argument is not well taken. After reviewing the record and relevant case law, we find that the prosecutor did produce sufficient evidence, if believed, to support the attempted murder and kidnapping of Simmons. However, the prosecutor did not produce sufficient evidence, if believed, to support the two counts of aggravated murder of Mitchell.

The kidnapping indictment relating to Mitchell charged appellant with:

"* * * unlawfully and purposely and by force, threat, or deception removed Ricky Mitchell from the place where he was found or restrained him of his liberty for the purpose of facilitating the commission of a felony or the the flight thereafter and/or terrorizing, or inflicting serious physical harm on Ricky Mitchell, and failed to release the victim in a safe place unharmed." R.C. 2905.01.

The kidnapping charge carried with it a gun specification.

However, the record in the case *sub judice* does not establish sufficient evidence, if believed, to support the offense of the kidnapping of Mitchell.

The state's theory with regard to the kidnapping of Mitchell was premised upon kidnapping by deception. The element of deception is defined in R.C. 2913.01(A) as:

"(A) 'Deception' means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission which creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact."

The record clearly reveals that the state failed to establish the element of deception. In fact, the record reveals that Mitchell had three separate opportunities to "leave" the appellant and not return to his company: 1) Mitchell arrived with the appellant at the home located at East 30 Street and Community Avenue; 2) Mitchell helped Simmons to the hospital whereupon Mitchell voluntarily returned to the appellant's automobile; and 3) Mitchell returned to his home on Norman Avenue and than voluntarily returned to the appellant's automobile with Ms. Sweeney.

A review of the evidence does not sufficiently support a kidnapping conviction in that the state's

evidence of restraint of Mitchell, if any, is insufficient. The trial court erred in overruling appellant's Crim.R. 29(A) motion as to the kidnapping of Mitchell. See *Jackson v. Virginia* (1979), 443 U.S. 307; *State v. Bridgeman* (1978), 55 Ohio St.2d 261.

***13** In addition, the trial court erred in overruling the appellant's Crim.R. 29(A) motion with regard to the offenses of the aggravated murder of Mitchell. R.C. 2903.01 specifically delineates the elements of the offense of aggravated murder with said elements being:

"Division (A):

"(1) Purposely and with prior calculation and design

"(2) Cause death of another.

"or

"Division (B):

"(1) Purposely cause death of another

"(2) While committing, attempting to commit, fleeing immediately after committing or attempting to commit

"(3) Kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or escape.

A review of the case *sub judice* clearly reveals that the evidence at the close of the state's case was entirely lacking in proof, either direct or circumstantial, as to several vital elements of the

offenses of aggravated murder as charged in the indictment. Specifically, the record reveals that:

1) there was no evidence before the trial court as to the circumstances, time, or place of Mitchell's death;

2) there was no evidence before the trial court that Mitchell met his death while in the company of the appellant during the morning of September 16, 1985;

3) the coroner could only provide an approximation of the time of Mitchell's death;

4) there was evidence of a vague conditional threat made by the appellant toward Mitchell and the display of a handgun which could have possibly indicated hostility between the appellant and Mitchell; and

5) there was evidence that the appellant made a number of statements to the effect that "Ricky wasn't coming back." However, such statements could hardly be considered as an admission of murder.

In deciding the appellant's Crim.R. 29(A) motion for judgment of acquittal as to the counts of aggravated murder, the trial court should have considered that:

1) there was no direct evidence that the appellant caused the death of Mitchell. The only evidence in the record on this issue was that the appellant was in the company of Mitchell on the morning of September 19, 1986 and that the appellant made conditional threats against Mitchell. In addition, the

appellant exhibited a violent disposition by shooting Simmons;

2) there was no evidence, either direct or circumstantial, with regard to the element of *purposeful* killing of another;

3) there was no evidence that the appellant intended to cause the death of another; and

4) there was no evidence as to felony murder in that what felony was perpetrated by the appellant at the time of the alleged murder.

As can be seen, the state failed to provide evidence with regard to several vital elements of the offense of aggravated murder.

*14 The Supreme Court of Ohio, in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus, with regard to Crim.R. 29(A) motions of acquittal, held that:

"Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

In the case *sub judice,* reasonable minds could *not* reach different conclusions as to whether the material elements of causation, purpose, and specific intent to cause the death of Mitchell had been proved beyond a reasonable doubt. Therefore, the trial court erred in overruling the appellant's Crim.R. 29(A) motion for acquittal with regard to the offenses of aggravated murder.

This error, however, does not jeopardize the integrity of the other charges for which the appellant was found guilty. The appellant's Crim.R. 29(A) motion for acquittal was properly overruled by the trial court with respect to the offenses of attempted murder and kidnapping in that the state met the burden of *Bridgeman*.

Finally, the appellant contends that his defense counsel erred by addressing the Crim.R. 29(A) motions solely to the two aggravated murder charges and the kidnapping charge relating to Mitchell. The record reveals that defense counsel was under the impression that the attempted murder and kidnapping charges relating to Simmons should be treated differently. For example, at the close of the state's case the following discussion ensued at Tr. 1801-1802:

"THE COURT: You have nothing to offer with respect to the other two Counts, I take it, Mr. Hill?

"MR. HILL: Your Honor, it is Defendant's position and as-well, Rule 29, as I understand it, indicates that the issue of credibility is not before the Court at this particular time, and we would *stipulate* that *if* the victim, Sam Simmons' *testimony is believed, that a prima facie case has been made with respect to those two charges.*" (Emphasis added).

The trial court, however, stated at Tr. 1803:

"THE COURT: With respect to Defendant's motions for judgments of acquittal, upon consideration of the motion and the argument of counsel, the Court is of the view that the motion for summary judgment on *all Counts* is not well taken

and, therefore, the motion as to each Count will be overruled." (Emphasis added).

At the close of the defendant's case, the same circumstances arose. Once again, the trial court denied the Crim.R. 29(A) motion "as to all counts." (Tr. 2129).

However, the appellant's contention of error by defense counsel is not well taken. The record clearly reveals that the state meet the test to be applied to a Crim.R. 29(A) motion for acquittal as established in *State v. Bridgeman, supra.* Defense counsel is under no obligation to make a motion for acquittal solely for the reason of appearance.

In the case *sub judice,* defense counsel was aware of the evidence presented by the state with regard to the offenses of attempted murder and kidnapping of Simmons. In addition, the trial court examined the appellant's Crim.R. 29(A) motion for acquittal with regard to each offense pending against the appellant regardless of the form of the defense counsel's motion practice.

***15** Therefore, no error resulted from the failure of appellant's counsel to include in his motions for acquittal, made pursuant to Crim.R. 29(A), the offenses of attempted murder and the kidnapping of Simmons.

However, the trial court did err in overruling the appellant's Crim.R. 29(A) motions for acquittal with regard to the two offenses of aggravated murder as a result of the failure of the state to provide evidence with regard to the material elements of causation, purpose, and specific intent to cause the death of

Mitchell. Reasonable minds could only conclude that the state had not proved each material element of the offenses of aggravated murder beyond a reasonable doubt.

Therefore, the appellant's eighth assignment of error is partially well taken.

Assignment of Error No. XI

"XI. THE TRIAL COURT ERRED IN DISMISSING A JUROR AFTER THE GUILT PHASE BUT PRIOR TO THE PENALTY PHASE, CONTRARY TO OHIO CRIMINAL RULE 24(F) AND R.C. SECTION 2929.03(C)(2)(b), THEREBY DENYING APPELLANT HIS UNITED STATES AND OHIO CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS."

-Juror Substitution-

The appellant contends that the trial court improperly excused regularly seated juror Mrs. Pemberton after she joined in returning a guilty verdict at the *first "guilt/innocence"* trial but before the *second "penalty"* trial.

According to defense counsel at Tr. 2366, Mrs. Pemberton communicated to the trial court, the prosecutor and the defense counsel that "she was just tired of the whole thing. She figured that she had done enough." Defense counsel objected to her dismissal as a juror by the trial court.

Unfortunately, apparently the entire proceedings pertaining to the substitution of Mrs. Pemberton as a seated juror by one of the two remaining alternate

jurors are not on the record. However, a review of the record at Tr. 2364, *et seq.* reveals the following to be *all* the statements of both counsel and the court referring to the following reasons given by Mrs. Pemberton for her request to be relieved as a juror. They were as follows:

1) She raised a possible medical issue, though no medical examination was sought nor diagnosis made. (This reason is attributable to Mr. Hill (defense counsel) at Tr. 2365).

2) She was tired of the whole thing. She figured that she had done enough. (Tr. 2366 attributable to Mr. Hill).

3) That her son had become ill at the time and that was something which was preying upon her mind. (Tr. 2366 attributable to Mr. Levenberg (the prosecutor)).

4) She also brought to the court's attention that a vacation had been scheduled. This would be the only time that she would be allowed by her employers to avail herself of this opportunity. That she and her family had made plans to be out of town during this period of time. (Tr. 2367 attributable to Mr. Levenberg). She felt that again with her son's condition would also affect her ability to be a fair and impartial juror and hear out those things that would come to the jury's attention during this particular phase of the trial. (Tr. 2367 attributable to Mr. Levenberg).

5) The court viewed that juror as she left the courtroom and it was obvious to the court that she

was crying and seemingly overwrought concerning something. (Tr. 2369 attributable to the court).

*16 6) A number of things that bothered her and suddenly seemed to overwhelm her. (Tr. 2369 attributable to the court).

7) One of them being the fact that her employer was not paying her regular salary while she served on this jury panel. (Tr. 2369 attributable to the court).

8) That a minor child was ill at home and needed her attention. (Tr. 2369 attributable to the court).

9) That the family had planned a vacation to start that very weekend which she said she was going to miss. (Tr. 2369 attributable to the court).

10) Some other matters, all of a personal nature. (Tr. 2370 attributable to the court).

11) It would be negative as to her health. (Tr. 2370 attributable to the court).

12) Mrs. Pemberton felt that she could not serve any further. Earlier, when polled, she indicated her acquiescence in and approval of the jury's "guilty" verdict during the guilt/innocence trial. (Tr. 2370 attributable to the court).

13) The juror was visibly shaken and in the court's lay opinion, she was highly upset. (Tr. 2370, an observation by the court).

The appellant argues that none of the reasons cited above should have permitted Mrs. Pemberton to be excused as a juror. Appellant contends that the trial court erred in substituting the alternate juror, Mr. Phiel, for the heretofore seated 'regular' juror,

Mrs. Pemberton, before the second "penalty" trial. Appellant further contends that he was entitled to the same jury during both the *first "guilt/innocence" trial* and *the second "penalty" trial.* Once Mrs. Pemberton was excused, however, he argues the court should have allowed the remaining eleven jurors to proceed with the sentencing phase *or* declare a mistrial on its own motion.

Criminal R. 23(B) (Number of Jurors) provides as follows:

"In felony cases juries shall consist of twelve."

This rule, being procedural, was waivable by appellant. A reading of the record at the point in the proceedings reveals that neither the appellant nor his counsel waived a jury of twelve for a jury of eleven. (See Tr. 2372, *et seq.*)

Appellant's contention that *the court* ought to have declared a mistrial similarly is not well taken. Alternate jurors, Mr. Phiel nor Mrs. Whatley were excused at the end of the first "guilt/innocence" trial and hence were available to assume the duties of a *second "penalty" trial deliberating juror.*

As possibly fortuitous for the appellant as it might have been for the trial court to declare a mistrial at this point, it would have been a clear abuse of discretion for the trial judge not to continue to try the second "penalty" trial for want of a juror when either of two were available, ready, willing, and able to be seated as a *deliberating* juror. (Perhaps a double jeopardy issue could have been raised by the appellant had the alternate juror Mr. Phiel not been substituted for the seated juror Mrs.

Pemberton and the trial court having declared a mistrial on its own initiative).

The trial court inquired of then alternate juror, Mr. Phiel, whether he could serve as a deliberating juror in the second "penalty" trial and he responded "yes." (Tr. 2373). He further qualified as follows:

*17 "THE COURT: * * * Mr. Phiel, you did sit and participate in this trial during the guilt phase, did you not, sir?

"MR. PHIEL: Yes, I did.

"THE COURT: And you participated up to the point the jury withdrawing to deliberate; is that right?

"MR. PHIEL: Yes.

"THE COURT: Now, sir, the question before us has to do with the Jury's verdict in the case as it returned this verdict. I will ask you, *will you as an alternate-as a juror, a regular panelist who must now consider the punishment phase, do you adopt the conclusions of the regular panel, including Constance Pemberton, which was returned to the Court on the 29th day of January, 1986?*

"MR. PHIEL: Yes.

"THE COURT: *Are you now, sir, prepared to proceed with the panel to dispose of the remaining considerations in this case which the Court has before it this afternoon?*

"MR. PHIEL: *Yes.*

"THE COURT: Thank you, sir. * * * " (Tr. 2373-2374). (Emphasis added).

At the outset, we note that we have been unable to find any case law exactly on point with this assignment of error. Thus, we now turn to the Criminal Rules for guidance and to garner the philosophy behind the Criminal Rules as they relate to juror selection.

Crim.R. 24(B)(9) states as a basis for a challenge for cause that a juror be excused if " * * he is possessed of a state of mind evincing enmity or bias toward the defendant or the state."*

This subsection, though not exactly applicable to the instant problem, indicates to trial courts the philosophy of this criminal rule that a person of a hostile state of mind ought not initially be seated as a deliberating juror. Similarly, extrapolating from Crim.R. 24(B)(9), once seated, a deliberating juror ought to be excused from jury duty if and when he (she) indicates an attitude that would likely involve a possible, if not probable, hostile state of mind if not excused from jury duty.

Similarly, as in Crim.R. 24(B)(9), *Crim.R. 24(B)(14) indicates that a juror who "* * * is otherwise unsuitable for any other cause to serve as a juror" should be dismissed.* Again extrapolating, this subsection also manifests a philosophy which ought to be employed by a trial court in excusing a seated juror indicating a desire to abandon jury duty.

While Crim.R. 24(F) states that an "alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

In a capital case, there are two separate trials. The first, the "guilt/innocence" trial, is followed by the second, "penalty" trial, wherein the jury weighs the aggravating circumstances and the mitigating factors and thereafter recommends punishment.

In the instant case, the trial court obviously concluded that the second "penalty" trial ought to have available alternate jurors. Hence, the trial court had two alternate jurors (Mr. Phiel and Mrs. Whatley) 'in reserve', who could replace an excused seated juror *and conclude the work of the two trials* by deliberating at the second "penalty" trial. We hold that the trial court did not abuse its discretion under these circumstances by substituting a qualified alternate juror for the disheartened Mrs. Pemberton. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

The trial court properly excused Mrs. Pemberton. The trial court could not proceed with only the eleven heretofore seated jurors without the appellant's waiver of Crim.R. 23(B). The trial court properly seated the available *voir dire* qualified alternate juror, Mr. Phiel, after inquiring of him as to his suitability to serve *at this point* in the trial. That is, Mr. Phiel, the substitute for juror Pemberton, adopted the conclusions of the regular panelists at the first "guilt/innocence" trial and agreed to faithfully perform his task at the second "penalty" trial. The trial judge certainly did not abuse his discretion substituting a marginal juror with a properly seated and requalified alternate juror in the "penalty" proceedings. (Tr. 2364-2374).

*18 This eleventh assignment of error is not well taken.

Assignment of Error No. XII

"XII. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL DEPRIVED THE APPELLANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS."

-Ineffective Assistance of Counsel at Trial-

In his twelfth assignment of error appellant contends his defense counsel rendered ineffective assistance of counsel. Appellant's basic thrust is that his defense counsel failed to move for mistrial at certain key points throughout the trial, i.e., after introduction of "other acts evidence; after admission of pictures of the corpse; after limitations on recross and redirect examination; after alleged prosecutorial misconduct during trial and closing arguments; and after a juror was dismissed.

A review of the record demonstrates that appellant's argument is without merit. At the guilt phase, counsel conducted the defense in an acceptable manner.

In *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, the United States Supreme Court adopted a two-prong analysis for determining whether counsel's assistance was so defective as to mandate reversal of a conviction:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland* at 693."

The test set out in *Strickland* is essentially the same as that enunciated in *State v. Hester* (1976), 45 Ohio St.2d 71, 79 and *State v. Lytle* (1976), 48 Ohio St.2d 391, 395, vacated on other grounds (1978), 438 U.S. 910. In *Lytle,* the Supreme Court of Ohio established the guidelines for determining the ineffective assistance of counsel issue. The court held at pp. 396-397:

"When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. *First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next,* and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, *there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.*" (Emphasis added).

A properly licensed attorney in Ohio is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. The burden of proving ineffectiveness of counsel is on the defendant. *State v. Smith* (1981), 3 Ohio App.3d 115.

*19 In a separate assignment of error, appellant has demonstrated error by the trial court in limiting recross and redirect examination. Also, we have sustained appellant's contention of prosecutorial misconduct. However, we do not believe that defense counsel failed to meet his burden and performed so deficiently as to prejudice the appellant's right to a fair trial by failing to move for mistrial after these acts by the trial court and prosecutor.

The appellant argues that his defense counsel prejudiced his interests by failing to make a motion for acquittal regarding the kidnapping and attempted murder of Simmons. This argument was discussed and rejected in the eighth assignment of error.

The appellant further contends his defense was compromised by the fact that the defense counsel failed to file many pretrial motions. The defense counsel did file two motions before trial. They were for a bill of particulars and for discovery. Appellant fails to cite which motions were not filed and how the motions would have enhanced his defense. Appellant's contention is without merit.

Finally, appellant cites cumulative errors by the defense counsel as evidence of ineffective assistance of counsel at trial. A review of the record reveals that appellant's argument is not well taken. Counsel presented cogent argument to the court and jury, he vigorously cross-examined state witnesses, and he often objected to inappropriate testimony. Such action by defense counsel demonstrates counsel's knowledge of the facts and law involved in the guilt phase of the case *sub judice*.

Accordingly, appellant's twelfth assignment of error is overruled.

Assignment of Error No. XIV

"XIV. THE COMBINATION OF ERRORS OCCURRING THROUGHOUT BOTH THE GUILT AND THE PENALTY PHASE DEPRIVED THE APPELLANT-DEFENDANT OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL."

-Accumulated Error-

Rules of Appellate Procedure, Rule 12(A) reads:

"(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. *Errors not specifically pointed out in the record and separately argued by brief may be disregarded.* All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." (Emphasis added).

A reading of appellant's fourteenth assignment of error leads only to the conclusion that the hereinabove asserted fourteenth assignment of error is not well taken by reason of App.R. 12(A).

***20** Assignment of errors numbers IV, VI, VII, and XIII are well taken and require the reversal of this conviction and remand of this prosecution for retrial of both the "guilt/innocence" trial and the "penalty" adjudication.

Assignment of Error No. IV

"IV. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF EVIDENCE OF IRRELEVANT PREJUDICIAL 'OTHER ACTS' OF PERCY HUTTON, AND THEREBY DEPRIVED HIM OF HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION."

-"Other Acts"-

In this fourth assignment of error, the appellant contends that the trial court erred in permitting a witness for the state of Ohio, Ms. Eileen Sweeney, to testify that the appellant and the co-defendant Laster picked her up at the hospital and en route home Laster let the appellant and Sweeney out of the automobile at a secluded park. She further testified that the appellant forced her to go behind a bush and raped her vaginally and orally. (The defendant was separately charged in a three count indictment, for one count of kidnapping and two counts of rape. As indicated earlier, it was this set of events which the prosecutor sought to have merged for trial with the case *sub judice*. The trial court did not permit this

merger of the two indictments, sustaining the objection of defense counsel who objected on the record to such merger.)

In Ohio, the general rule is that "other acts" evidence is inadmissible where the alleged "other acts" are *wholly independent* of the offense for which a defendant is on trial. *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 314.

Exceptions to this general rule are enumerated in R.C. 2945.59 (Proof of Defendant's Motive), which provides as follows:

"In any criminal case in which the defendant's *motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved,* whether they are contemporaneous with or prior or subsequent thereto, *notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.*" (Emphasis added).

The first of the most recent Ohio Supreme Court cases on the issue of proof of "other acts" of the defendant in criminal cases is *State v. Burson* (1974), 38 Ohio St.2d 157. In that case, in a *per curiam* decision the court held:

"This court has, thus far, permitted this statute to operate as an exception to the general rule that the introduction of evidence tending to show that the accused has committed any crime unconnected with

the offense for which he is on trial is not permitted. *State v. Hector* (1969), 19 Ohio St.2d 167, 249 N.E.2d 912. *Therefore, R.C. 2945.59 must be strictly construed against the state.* See *State v. Strong* (1963), 199 Ohio App. 31, 196 N.E.2d 801." (Emphasis added).

Thus the court enunciated the general rule and the exception thereto, R.C. 2945.59.

***21** The next major case is *State v. Curry* (1975), 43 Ohio St.2d 66. Chief Justice O'Neill clearly stated the rule on "other acts" evidence as follows:

"As is the case with most general rules, the rule denying admissibility of evidence of other crimes is subject to certain exceptions. The only exceptions relevant in the present case are those codified in R.C. 2945.59:

" 'In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.' "

The similarity of the case at bar and *Curry, supra,* is striking. The Supreme Court in *Curry* addressed it at p. 70:

"*The only questions at issue, therefore, were whether appellee had or attempted to have sexual intercourse with Marie on the morning of July 8, 1972.* Recognizing that these integrally related questions were the only material elements in dispute, *it is necessary to determine whether any of the matters enumerated in R.C. 2945.59* (motive, intent, absence of mistake or accident, or scheme, plan or method of doing an act) *were relevant at appellee's trial, and, if so, whether the prosecution's 'other acts' testimony tended to prove that relevant enumerated matter.*" (Emphasis added).

The *Curry* court held that the defendant's "other acts" of sexual activity with another female on another date was not integrally connection with his activities in the case *sub judice.*

The next case is *State v. Lytle* (1976), 48 Ohio St.2d 391. Chief Justice Celebrezze addressed the issue at p. 403:

"'* * * To be admissible pursuant to the sub-category * * * *the "other acts" testimony must concern events which are inextricably related to the alleged criminal act.*' (Emphasis added.)

In *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 314, Justice Paul W. Brown wrote:

"It is a well established rule that in a criminal trial *evidence* of previous or subsequent criminal acts, *wholly independent of the offense for which a defendant is on trial, is inadmissible. Whiteman v. State* (1928), 119 Ohio St. 285; *State v. Hector* (1969), 19 Ohio St.2d 167. * * * " (Emphasis added).

Further, at p. 315, Justice Brown stated:

" ' "Scheme, plan or system" evidence is relevant in two general factual situations. First, those situations in which the "other acts" form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. * * * To be admissible pursuant to this subcategory of "scheme, plan or system" evidence, the "other acts" testimony *must concern events which are inextricably related to the alleged criminal act.*' " (Again, emphasis added).

Justice Brown concluded at p. 317:

***22** "' * * * *[E]vidence of other crimes may be presented when "they are so blended or connected with the one on trial as that proof of one incidentally involves the other;* or explains the circumstances thereof; or tends logically to prove any element of the crime charged." ' (Citation *United States v. Turner* (C.A.7, 1970), 423 F.2d 481, at 483-84, certiorari denied 398 U.S. 967." (Emphasis added).

Justice Brown reiterated at p. 318:

" * * * To the contrary, the exceptions in the statute must be strictly construed. *State v. Burson, supra,* at 158."

Finally, see *State v. DeMarco* (1987), 31 Ohio St.3d 191:

"Evidence of other acts of a defendant is admissible pursuant to R.C. 2945.59 only when it tends to show one of the matters enumerated in that statute *and* when it is relevant to prove the defendant's guilt of the offense in question." (Emphasis added).

Ms. Sweeney could have and did rightfully testify about the appellant's possession of a handgun in the park and that while in the park the appellant said to her, "Ricky wasn't coming back * * * to forget about him."

The inquiry by the prosecutor pertaining to the alleged kidnapping/rapes; however, was totally improper. It was not *inextricably related* to the crimes of the case-in-chief, namely: the aggravated and attempted murders and kidnappings.

In the instant case, the only possible reason of informing the jury of the defendant's sexual conduct in the context of rape would have been to show his " * * * scheme, plan or system * * *." It could not come within any other proviso of R.C. 2945.59. By no stretch of the imagination was Sweeney's testimony regarding the alleged rapes-kidnapping evidence of "other acts" inextricably related to the aggravated and attempted murders and kidnappings charged in the indictment.

Further, this testimony was highly prejudicial to the appellant. Evid.R. 403(A) states:

"(A) Exclusion Mandatory. Although relevant, *evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice,* or confusion of the issues, or of misleading the jury." (Emphasis added).

We find that the jury received this damaging testimony over appellant's objection and improperly considered it as further proof of the appellant's commission of the aggravated and attempted murders and kidnappings.

The appellant's fourth assignment of error is well taken and mandates reversal.

Assignment of Error No. VI

. "VI. THE TRIAL COURT ERRED IN LIMITING BOTH RE-DIRECT AND RECROSS-EXAMINATION OFFERED BY DEFENSE COUNSEL, THEREBY DENYING APPELLANT HIS UNITED STATES AND OHIO CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND CONFRONTATION."

-Redirect and Recross Examination Errors-

Appellant's sixth assignment of error contends that the court improperly restricted both redirect examination (by the prosecutor) and recross examination (by defense counsel) of the state's witness Mrs. Mary Etta Pollard.

Appellant's argument has merit in that the evidence elicited from the state's witness, Mrs. Mary Etta Pollard, was highly prejudicial and damaging to the defendant and that the court did not allow defendant to recross examine her and rehabilitate her.

***23** Initially, *on direct examination,* Mrs. Pollard testified for the state that she was the appellant's neighbor; and that she heard Simmons in the early morning hours of September 16, 1985 knocking on her door yelling "I'm shot. I'm shot." She saw the appellant pull up to her house in his car and call for Simmons to "Come here." (Tr. 1576).

On cross-examination, the defense counsel asked Mrs. Pollard at Tr. 1592:

"Q. Isn't it a fact that you have never known the Defendant to have been violent towards someone?

"A. Never."

Thereafter, *on redirect,* the prosecutor questioned Pollard at Tr. 1598-1599:

"Q. Now, Mrs. Pollard, isn't it a fact that you know Percy Hutton *took the life of someone?*

"MR. HILL: Objection.

"THE COURT: Overruled.

"A. Answer?

"THE COURT: Yes, you may answer.

"A. Yes, I heard of it.

"Q. Don't you consider that an act of violence?

"A. *I consider that, from the way I got it-*

"Q. Could you give me a yes or no answer?

"MR. HILL: Your Honor, may we approach the bench?

"THE COURT: Just a moment, sir. If you can answer the question in the form asked of you, Mrs. Pollard, you should do so. If you cannot, and you don't understand it, say so so that the counsel can reframe the question and rephrase it.

"A. *Well, I don't understand that particular question.*

"Q. If someone takes the life of another, don't you consider that an act of violence?

"MR. HILL: Objection.

"THE COURT: Overruled.

"A. Answer?

"THE COURT: Yes, you may answer.

"A. *It is according to the circumstances.* Yes, it is an act of violence, *but if you are protecting yourself, you have to protect yourself any kind of way,* you have to know how to protect yourself. I can't just see someone going out and shooting someone or killing someone. I think, yes, that's an act of violence.

"Q. Now, isn't it a fact that you also know that this Defendant, Percy Hutton, committed armed robbery?

"A. *No, I don't know that as a fact.*

"Q. Okay. But you do know that he did take the life of someone?

"A. Yes, I heard that.

"Q. Would you consider armed robbery to be an act of violence?

"MR. HILL: Objection.

"THE COURT: Overruled. You may answer.

"A. Yes." (Emphasis added).

On recross examination the defense counsel attempted to question Ms. Pollard as to the details of the appellant's taking of someone's life. The trial court sustained the prosecutor's objections and the defense counsel ended his recross examination without further questioning. It was obvious that Mrs. Pollard wished to say more to clarify her

answer when she said "I consider that, from the way I get it-." She also informed the court that "Well, I don't understand that particular question." And finally she said "It is according to the circumstances."

From these interjections by Mrs. Pollard it is obvious that she had more to say on the issue. It is obvious that defense counsel knew the appellant took the life of another, was prosecuted for manslaughter, and his conviction was reversed on appeal. Defense trial counsel wanted to inquire about this matter. Appellant asserts as error that the prosecutor never clarified the fact that the appellant's 1978 conviction for voluntary manslaughter, felonious assault, and abduction was reversed by this court in *State v. Hutton* (May 8, 1980), Cuyahoga App. No. 39954, unreported. It was the responsibility of defense counsel *to try* to rehabilitate on this issue. He obviously was endeavoring on recross examination to get into this area but was precluded from doing so by the trial court.

***24** Appellant's complaint that the prosecutor's questioning of the witness regarding the appellant's "tak(ing) the life of another" when the prosecutor knew or should have known that the appellant's conviction was reversed is well taken, however. This court, in *State v. Sims* (1981), 3 Ohio App.3d 321, at 323 held that:

"Evid R. 404(B) excludes evidence of other bad acts to prove the character of the accused, in order to show that the accused acted in conformity with his character on the occasion of the crime; proof of other bad acts is admissible only to show 'motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake or accident.' In the case at bar, however, the evidence of prior arrests was not offered to prove the character of the accused. Both *Wagner v. State* and *State v. Cole, supra,* forbid the use of prior arrests to impeach a defendent's (sic) testimony on cross-examination. The state did not refer to the appellant's prior arrest to impeach *his* testimony. The evidence of prior arrests was offered to impeach Mr. King's testimony that the appellant had a reputation for non-violence. This line of inquiry is proper under Evid R. 405(A), which provides:

" 'In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.* (Emphasis added.)'

"The fact that the appellant had been arrested for aggravated robbery and felonious assault would necessarily affect his reputation for nonviolence. These instances of misconduct were therefore relevant to the testimony of the character witness, and were admissible to impeach *his* statement that the appellant had a reputation for non-violence. This result would have been reached even prior to the enactment of the Rules of Evidence, under the authority of *State v. Elliott* (1971), 25 Ohio St.2d 249 [549 O.O.2d 371], in which the Ohio Supreme Court held:

" 'A character witness may be cross-examined as to the existence of reports of particular acts, vices, or associations of the person concerning whom he has

testified which are inconsistent with the reputation attributed to him by the witness-not to establish the truth of the facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given his testimony. Such inconsistent testimony tends to show either that the witness is unfamiliar with the reputation concerning which he has testified, or that his standards of what constitutes good repute are unsound.' (Paragraph two of syllabus.)" (Emphasis in original).

The Supreme Court in *State v. Elliott* (1971), 25 Ohio St.2d 249 stated that the witness' testimony cannot be used to establish the truth of the fact asserted. The court also stated at p. 253:

***25** "If the defendant had never been convicted of a felonious assault, *such question by the prosecutor, being made in bad faith, would be the predicate for error.* * * * " (Emphasis added).

In the instant case, the prosecutor questioned Mrs. Pollard as to appellant's "tak[ing] the life of another" *with the knowledge that appellant's voluntary manslaughter conviction had been reversed.* The prosecutor's questions went beyond the mere impeachment of Mrs. Pollard and were manifestly asked for the further purpose of discrediting the appellant to the jury. As such, the prosecutor's line of redirect examination was wholly unfair and highly prejudicial to the appellant. See *Wagner v. State* (1926), 115 Ohio St. 136; *State v. Cole* (1958), 107 Ohio App. 444.

Evid.R. 609(C) mandates:

"(C) Effect of Pardon, Annulment, Expungement, or Certificate of Rehabilitation. *Evidence of a conviction is not admissible under this rule if* (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) *the conviction has been the subject of a pardon, annulment, expungement, or other equivalent procedure based on a finding of innocence.*" (Emphasis added).

Thus the prosecutor discredited the appellant by using a reversed-on-appeal conviction-a non-conviction under Evidence Rule 609(C).

See 81 Am.Jur.2d 576 which states:

"Effect of appeal or motion.

"While *the fact of previous reversal of a judgment of conviction so far destroys it as to preclude proof of the conviction to affect credibility,* * * *." (Emphasis added).

This sixth assignment of error is well taken and mandates reversal.

Assignment of Error No. VII

"VII. PROSECUTORIAL MISCONDUCT DURING TRIAL AND FINAL ARGUMENT TO THE JURY DENIED APPELLANT HIS FOURTEENTH

AMENDMENT DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

-Prosecutorial Misconduct During Trial and Closing Argument-

Assignment of error VII basically addresses prosecutorial conduct. It has two thrusts: 1) the prosecutor's misconduct at trial by reason of the prosecutor's redirect examination of Mrs. Mary Etta Pollard, and 2) the prosecutor's final argument during his "penalty trial" closing argument.

During our consideration of assignment of error number VI we have discussed prosecutorial misconduct during direct examination of Mrs. Pollard and found it improper.

A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones. *Berger v. United States* (1935), 295 U.S. 78, 88. The prosecution must avoid insinuations and assertions which are calculated to mislead the jury. *Id.*

The transcript at Tr. 2392-2397 reveals the appellant's area of concern with the prosecutor's "punishment" trial closing argument.

***26** "MR. LEVENBERG: * * *

"Here is an interesting statutory mitigating factor, *the Defendant's lack of a significant history of prior criminal convictions* and delinquency adjudications.

"In other words, what the Legislature is saying here is that if you have got someone who has a significant lack of a history of these things or

perhaps no history at all, then that's a mitigating factor and you should be ascribing some weight to it.

"Well, you have heard some of the things about this Defendant. You know that he has got a conviction in the past for armed robbery, and you know that he has got a conviction for having a weapon while under a disability, but *you are going to hear and you are going to see a lot more about the criminal conduct of this Defendant when you read the pre-sentence investigative report from the Probation Department,* going back to Juvenile adjudications. You can see how he has been spending his adult life and whether or not he has taken advantage of the time he has spent in State institutions.

"Well, was the Defendant the principal here or was he an aider and abettor? I don't think there is any question on that issue. Of course, if he is the aider and abettor, then that might be a mitigating factor as opposed to being the principal.

"Then there is the catch-all, anything else that you should decide is a mitigating factor. That makes your job tough, but I think each one of you knew full well that when you got involved in this process and you made that commitment to us and to the Court, that you would be able to come up to that challenge. It is not going to be an easy job to go back in there, it is not a flip of the coin.

"What is there about this Defendant's past? Well, it goes on for one page, almost a full second page and an addendum about his criminal activity. *Starting in 1967 charged with auto trespass.* This would be as a juvenile.

"*Again in 1969 the same charge, auto trespass. Both times he was released. Caught a couple of breaks.*

"*Finally in February of '69, one month later after that last time, he was released again, auto trespass. This time Juvenile Court had enough, they put him on probation.* See, even back in '67 he had an interest in automobiles. *Fermenting then that back yard roving mobile outside your neighborhood auto repair operation, 24-hours a day.*

"March '69, *while he was on probation for only a month, auto break-in, larceny. Goes up another notch.* Adjudicated delinquent, placed with Ohio Youth Commission.

"*The year is not even over, December 1969, auto stealing. Adjudicated delinquent, placed with Ohio Youth Comjission (sic).*

"September '71, and of course they are giving you ages over here in parentheses by these dates, how old when all of these are happening, he is still not even an adult yet. *Carrying a concealed weapon. No disposition.*

"November '71, he finally turned 18, *auto stealing. Released. Another break.*

***27** "*December '71, Selective Service Act Auto Law. Again he gets a release,* this time out in Lakewood. *How many times do they have to pat this guy on the back?*

"Finally in June of '72 we come to his armed robbery. Found guilty by another jury. Sentenced

him to the Ohio State Reformatory. *Gets out on parole in April of '76.*

"A little more than *a year later, July of '77, he is involved with a homicide. Murder, felonious assault, having weapon while under disability, kidnapping. That was when he was working as a security guard with Admiral Security, Incorporated. Remember that.*

"*He is found guilty in '78 of voluntary manslaughter, felonious assault, weapons disability and abduction. Sentenced again. This time he doesn't go to the Reformatory, he goes to a penitentiary. He appeals the conviction and everything except for the weapons disability charge is reversed by the Court of Appeals and there is no further prosecution. He gets paroled again.*

"Then we come to the addendum because it is out of sequence here.

"June of '81, Euclid, Ohio, *charged with carrying a concealed weapon,* having a weapon while under a disability. *Later that year the case is dismissed.*

"December '81, Cleveland, Ohio, receiving stolen property and possession of criminal tools. Goes to trial, this time he is found not guilty.

"One of the interesting things that you will see here is that all of this stuff is under the name of Percy Hutton, and these two here, after he gets on parole the second time, are under the name of William Hutton. *Things are too hot under the name of Percy Hutton.*

"*June of '84, forgery. He gets released again.* Then finally October, 1985, perhaps this time the law and the people of the State of Ohio have finally caught up with Percy Hutton, also known as William Hutton, and he is charged with aggravated murder, kidnapping and attempted murder. *You will also note that he has another case pending, rape and kidnapping, and it doesn't take much to figure out what that involves.*

"That's a little bit about the criminal history of the Defendant. *You have to decide whether or not there is a significant lack of criminal history here, juvenile adjudications.*

"I submit to you, ladies and gentlemen, that the record says that there is not, and that is not a mitigating factor as it relates to this Defendant, Percy Hutton, that there are no psychological or psychiatric, medical, mental, whatever you want to call it, mitigating factors here as it relates to this Defendant.

"*This Defendant has had more than enough breaks by the system, throughout his youth and his adult life, and he has refused to take advantage of them.* * * * " (Tr. 2392-2397). (Emphasis added).

In the instant case, the prosecutor's remarks during trial, closing argument and at the "penalty" phase greatly harmed the appellant's substantial rights to a fair trial.

In a capital case, it is impermissible to reveal to the jury the existence of offenses for which the defendant has not been convicted. In the case *sub judice,* the record reveals that the state specifically

enumerated during closing arguments the appellant's alleged criminal history and specifically revealed the following offenses for which the appellant had been charged in the past: 1) auto trespass; 2) auto trespass; 3) auto trespass; 4) auto break-in, larceny; 5) auto stealing; 6) carrying concealed weapon; 7) auto stealing; 8) selective service auto law; 9) armed robbery; 10) murder, felonious assault, having a weapon while under disability, and kidnapping; 11) carrying a concealed weapon; 12) receiving stolen property and possession of criminal tools; and 13) forgery. Of these thirteen alleged criminal offenses, only the offenses of armed robbery and voluntary manslaughter resulted in convictions with the offense of manslaughter being reversed on appeal.

***28** The conduct of the state in revealing the appellant's criminal history with regard to charged offenses which did not result in convictions was impermissible and resulted in an unfair prejudice to the appellant.

In *United States v. Hastings* (1983), 76 L.Ed.2d 96, 107, the United States Supreme Court held that in order to sustain a conviction under these circumstances it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty. Here, we do not find, beyond a reasonable doubt, that the jury would have found defendant guilty absent the prosecutor's improper remarks.

Accordingly, the seventh assignment of error is well taken and mandates reversal.

Assignment of Error No. XIII

"XIII. INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE DEPRIVED APPELLANT OF A FAIR AND COMPLETE HEARING AS TO THE APPROPRIATE SENTENCE, THEREBY DENYING APPELLANT OF HIS RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I. SECTIONS 9 AND 10 OF THE OHIO CONSTITUTION."

-Ineffective Assistance of Counsel at the "Penalty" Proceedings-

Appellant claims that the only evidence offered in mitigation was the unsworn statement of the appellant. This is not entirely true. As previously noted, the jury did receive a presentence report and psychiatric report relating to the appellant. Also, the defense counsel's closing argument reiterated appellant's unsworn statement that he was not guilty and reminded the jury that the Court of Appeals reversed the appellant's 1978 voluntary manslaughter conviction. Defense counsel also attempted to excuse away appellant's lengthy juvenile record.

Appellant argues as further evidence of error that his trial counsel:

1) failed to object to the firearm specifications. This argument lacks merit. A review of the record clearly reveals that the firearm specifications which form the basis of the appellant's argument were submitted to the jury during the "guilt/innocence" phase of the trial. The trial court did not submit the

firearm specifications to the jury during the "penalty" phase and thus the holding of *State v. Johnson* (1986), 14 Ohio St.3d 87, is not applicable herein.

Thus, the inclusion of the firearm specifications for the juries deliberation in the "guilt/innocence" phase was without error and the appellant's counsel was not ineffective with regard to said jury deliberation of the firearm specifications.

***29** 2) failed to object to prosecutor's reading of appellant's juvenile record to jury at penalty phase. Defense counsel failed his obligation by allowing the probation report to go to the jury in the form prepared by the probation department. Minimally, defense counsel ought to have had the appellant's criminal record excised as to certain of the appellant's criminal notations which, in reality, were never found to have been crimes.

In fact, the request of appellant's counsel for a probation report in conjunction with the known criminal history of the appellant was ineffective assistance of counsel in that the litany of various alleged offenses in the appellant's probation report prejudiced the appellant. The opportunity of the state to use the unsubstantiated criminal history of the appellant during the mitigation phase resulted in the unsubstantiated criminal history becoming an additional aggravating circumstance for all intents and purposes. For example, the record sheet referred to dispositions as "released," "no disposition," and "pending." R.C. 2909.04, Criteria for Imposing Death or Imprisonment for a Capital Offense, subsection (B) specifically provides:

" * * * the * * * trial jury * * * shall consider and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all the following factors:

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; * * * "

In the case *sub judice,* the jury received a presentence probation report enumerating twelve purported criminal episodes in the defendant's life which all may not have been crimes. (As noted earlier, approximately half of these matters were disposed of as "released," "no disposition," and "pending.") Presented to the jury in that form, the jury could make improper inferences or conclusions about the appellant's purported criminal life. It is safe to assume that the jury could infer whatever it pleased about the defendant simply because they were improperly given this information. And the prosecutor argued them vigorously (see assignment of error VII).

Defense trial counsel ought to have requested the excision of these references to the appellant's alleged prior criminal life. Certainly, it was not harmless error to allow this information to go to the jury. (See *State v. Glenn,* 28 Ohio St.3d 451, at 459, for a discussion of other similar types of problems with presentence probation reports going to juries in capital cases). It is this court's view that this constitutes ineffective assistance of counsel.

3) failed to object when prosecutor only briefly mentioned the reversal of voluntary manslaughter, felonious assault, and abduction convictions by Court of Appeals. This objection refers to the prosecutor briefly mentioning the reversal of the voluntary manslaughter, felonious assault, and abduction convictions on the appellant's successful appeal of the conviction for those counts. One can only conceive that the prosecutor recalled the error of his way in going into this subject during his case-in-chief while in the "guilt/innocence" proceedings. We have written of them earlier and they were obviously improper. By no stretch of the imagination can this court efficaciously approve this conduct by the prosecutor. Closing arguments are not evidentiary proceedings. This *jury was so instructed* during the "guilt/innocence" trial. How the prosecutor perceived that he could introduce evidentiary matters during the state's sentencing proceedings closing arguments in a capital case defies description. Though it was improper for the prosecutor to endeavor to introduce evidence during his "penalty" closing argument, it actually might be perceived as inuring to the appellant's benefit. A review of the transcript reveals that defense counsel did the best he could with a bad situation under the circumstances. However, his efforts constituted ineffective assistance of counsel.

4) failed to object to use of "recommend" in jury instructions regarding the death sentence. This is a repeated assignment of error. We have addressed ourselves to it in assignment of error number X. It is not well taken.

***30** 5) failed to object to jurors returning home over the weekend between guilt and penalty phase. The rule pertaining to the control of jurors is found in Crim.R. 24(G), which provides as follows:

"(G) Control of Juries

"(1) Before Submission of Case to Jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

"(2) After Submission of Case to Jury

"(C) Capital Cases. After submission of a capital case to the jury, *the jury shall remain under the supervision of an officer of the court until a verdict is rendered* or the jury is discharged by the court.

"(3) Separation in Emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors." (Emphasis added).

Appellant complains that the trial court failed in allowing jurors to return to their homes over the weekend between the "guilt/innocence" and the "sentencing" phase.

This jury had concluded its deliberations and rendered its verdict in the "guilt/innocence" proceedings. The jury had rendered its verdict and within the sound discretion of the trial judge the court allowed the trial jury to return home for the weekend. The empaneled trial jury had no other business before it at that time except to wait for the second "penalty" trial. It had no deliberations with

which to involve itself. Hence, it was entirely discretionary with the trial judge as to whether the jury should be supervised or sequestered. To sequester citizens at a non-crucial phase of the trial, that is, at the culmination of their deliberations of the "guilt/innocence" proceedings and before the consideration of the "sentencing" proceedings, would have been unnecessary and conceivably at least inconvenient for the jury.

It is within the sound discretion of the trial judge to handle its trial jury in a method most effective, most prudent and most conducive of producing their fair and just verdict. Hence, if the trial court perceives sequestration necessary, absent an abuse of discretion, it may so do: if a trial judge perceives the better approach to be a "separation of the jury," absent an abuse of discretion, it may so do.

There is nothing in the statutory or case literature pertaining to capital cases which requires the trial judge to sequester a jury rather than allowing them to return to their homes.

In *Jenkins, at* p. 234, the Supreme Court says:

"During their actual deliberations in a capital case, jurors must be sequestered. R.C. 2945.33. *Ohio's statutory framework for imposition of capital punishment neither mandates nor precludes sequestration of the jury following its guilty verdict, but prior to the penalty phase.* However, in an effort to minimize the risk of jury contamination, the court herein directed that the jury remain under loose court supervision between the two trial segments. During this interval the jury was not receiving evidence or deliberating; however, the court believed

certain communications could be prejudicial. The court transported the jurors to a resort motel in an adjoining county where bailiffs could monitor their activities. Their spouses and children could visit and they could participate in various recreational activities." (Emphasis added).

From the above opinion of the Supreme Court we can only conclude that the sequestration or the separation of the jury is within the sound discretion of the trial court. We see no abuse of discretion whatsoever in that regard in these proceedings.

*31 As enumerated herein we feel the defendant was deprived of effective assistance of counsel. This thirteenth assignment of error is partially well taken as indicated herein.

Assignment of error III appropriately deserves this court's attention at a later date.

Assignment of Error No. III

"III. IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, SECTIONS 9, AND 16 OF THE OHIO CONSTITUTION, THE APPELLANT'S SENTENCE OF DEATH IS INAPPROPRIATE AND DISPROPORTIONATE TO SIMILAR CASES."

-Proportionality-

Appellant's assignment of error III raises the proportionality issue. It arises out of and because of R.C. 2929.05. This section mandates that both the Court of Appeals and the Supreme Court review all

capital cases to determine whether the trial court's sentence was appropriate.

R.C. 2929.05 states:

"* * * The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case * * *." R.C. 2929.05(A).

By reason of this court's findings pertaining to assignments of error IV, VI, VII, and XIII, we feel it inappropriate to decide the proportionality issue at this time. It is entirely possible that on review of this matter by the Supreme Court that that court will agree with us. Hence our consideration of proportionality would be premature and inappropriate prior to a retrial of the case-in-chief

which this case calls for. If that be the case and the matter returned to the Court of Common Pleas for further proceedings, the trial court would be left in the uncomfortable position of trying a case calling for possible capital punishment wherein an appellate court had in fact therebefore found that the imposition of capital punishment was warranted.

A consideration of proportionality should only be made *after* a review of the case manifests that a fair and just trial was had.

If on the other hand the Supreme Court disagrees with our rulings on the "reversed" assignments of error, this matter should be remanded to this court for a finding on the "proportionality" assignment of error.

***32** Judgment reserved.

McMANAMON, P.J., concurs with concurring opinion.

PATTON, J., dissents with dissenting opinion.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

McMANAMON, Judge, concurring:

Although I concur that Percy Hutton's conviction must be reversed, I do so on narrower grounds. I agree that reversible error occurred in the admission of Eileen Sweeney's testimony that Hutton raped her (the fourth assignment of error), and in defense counsel's ineffective assistance during the penalty phase (the thirteenth assignment of error). While I concur that the trial court erroneously restricted the scope of defense counsel's recross-examination (the sixth assignment of error), I do not believe the error was prejudicial. I cannot concur that the trial court erred in overruling Hutton's Crim.R. 29 motions for acquittal (the eighth assignment of error). Finally, I believe the court's admission of a series of gruesome photographs was erroneous and prejudicial (the fifth assignment of error).

I agree that the trial court erred in admitting Eileen Sweeney's testimony about the alleged rape, and that this error requires reversal of Hutton's conviction.

Sweeney testified that Hutton, after picking her up at the hospital, drove to a park and raped her. While at the park, Sweeney averred, Hutton brandished a small silver handgun with a white handle, a weapon similar to the one described by Samuel Simmons, Jr. Sweeney further alleged that Hutton told her "Ricky wasn't coming back" (Tr. 1183), and that she should "forget about him." (Tr. 1265).

Evid.R. 404(B) provides:

"Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Construing this rule and its statutory counterpart, R.C. 2945.59, the supreme court has held that "other acts" evidence is admissible "only when it tends to show one of the matters enumerated in that statute and when it is relevant to prove the defendant's guilt of the offense in question." *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph one of the syllabus. See, also, *State v. Burson* (1974), 38 Ohio St.2d 157, 158. The rule is to be construed strictly against the state and applied conservatively by trial courts. *DeMarco, supra,* at 194.

I see no basis for the state's argument that the alleged rape was relevant to show intent, motive, opportunity and lack of mistake. Under the state's trial theory, Hutton's motive was to avenge the theft of a sewing machine. It was undisputed that Hutton had the opportunity to kill Mitchell. Neither intent nor mistake was at issue in the case. The primary trial issue was the identity of Mitchell's killer, and the rape evidence was irrelevant to that inquiry.

***33** The state contends the alleged rape provided an essential context in which to present Sweeney's description of the handgun and Hutton's admission.

A defendant's other acts may be admissible as probative of a "scheme, plan or system" if the

evidence "forms part of the immediate background" of the charged offense. *State v. Wilkinson* (1980), 64 Ohio St.2d 308, paragraph two of the syllabus (construing R.C. 2945.59). However, the other acts must be "inextricably intertwined" with the offense and be "necessary to give the complete picture of what occurred." *Id.* at 318. See, also, *State v. Thompson* (1981), 66 Ohio St.2d 496, 498.

The alleged rape cannot be characterized as "inextricably intertwined" with either Hutton's statement or Sweeney's identification of the gun. Hutton's admission in that context was merely cumulative in view of Sweeney's account of their subsequent conversation at LaWanda Mitchell's home:

"A. He first asked me, would I tell Ricky's family what happened. Then he told me, Ricky wasn't coming back, and if I told someone would be looking for me. I told him I wouldn't tell, and he talked on the phone to someone." (Tr. 1191).

Moreover, the disputed testimony could effectively have been presented to the jury without reference to the alleged rape. Since the temporal sequence was not critical at that point in the state's version of the events, the alleged episode at the park could have been deleted without denying the jury "the complete picture of what occurred."

Assuming the evidence had some marginal relevance, it would still be inadmissible if its probative value was "substantially outweighed by the danger of unfair prejudice * * *." Evid.R. 403(A); *State v. Wilson* (1982), 8 Ohio App.3d 216, 219.

I note initially the trial court overruled the state's motion to consolidate the rape charge with the counts tried herein. Since all the charges arose from the same chain of events, and the evidence supporting the alleged rape was simple and distinct from that underlying the other offenses, it is fair to infer the court's ruling reflected concern with the danger of unfair prejudice. (Tr. 5-6). Cf. *State v. Hammon* (Jan. 16, 1986), Cuyahoga App. No. 49934, unreported (discussing the considerations pertinent to deciding a Crim.R. 14 motion to sever counts for trial).

The prejudice averted by the court's ruling was realized when the court permitted the introduction of Sweeney's testimony. Given the highly inflammatory nature of this evidence, considered with its dubious relevance, exclusion pursuant to Evid.R. 403(A) was warranted.

Although the court instructed the jury not to consider the alleged rape as substantive evidence, the damage could not be undone. Under analogous circumstances, the supreme court has recently cautioned:

***34** "The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The undeniable effect of such information is to incite the jury to convict based on past misconduct rather than restrict their attention to the offense at hand. For this reason, we do not consider the trial court's admonitions to the jury that appellee's prior convictions are immaterial to his

guilt of the present charge sufficient to cure the error." *State v. Allen* (1987), 29 Ohio St.3d 53, 55.

Despite the trial court's limiting instruction, the actual use of the evidence at trial far exceeded the narrow purposes professed by the state below and on appeal. In closing arguments during the guilt phase, the prosecutor remarked:

"I mean, my God in heaven, there is no way, as many of these cases as I have handled since I have been associated with the office of the Cuyahoga County Prosecutor, I will never, never be able to appreciate what rape means to a woman. I cannot." (Tr. 2282).

In the penalty phase, the prosecutor, while expounding upon Hutton's juvenile and adult criminal record, reminded the jury:

"You will also note that he has another case pending, rape and kidnapping, and it doesn't take much to figure out what that involves." (Tr. 2397).

The record thus illustrates a classic example of how "other acts" evidence may be misused. The use of such evidence to show a defendant's propensity toward criminal conduct is strictly proscribed. *State v. Mann* (1985), 19 Ohio St.3d 34, paragraph one of the syllabus. Because I do not believe this error was harmless beyond a reasonable doubt, this court must reverse Hutton's convictions and remand this cause for a new trial. See *State v. Williams* (1983), 6 Ohio St.3d 281, paragraph three of the syllabus.

In his thirteenth assignment of error, Hutton contends he received ineffective assistance of counsel during the penalty phase when, *inter alia,* defense

counsel failed to object to the prosecutor's recitation of Hutton's juvenile record. Hutton's juvenile and adult criminal record was contained in a pre-sentence report prepared pursuant to R.C. 2929.03(D)(1), which provides in part:

"* * * When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. * * * A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it."

Hutton's juvenile record contained six notations, three marked "released" or "no disposition," and three delinquency adjudications. His adult criminal record consisted of five instances noted "released," "dismissed," or acquitted. Hutton had only two actual convictions, one of which was later reversed on appeal. Two cases were listed as "pending": the instant cause as well as rape and kidnapping charges related to the Sweeney incident.

***35** Although the rules of evidence generally apply to the penalty phase of capital cases, presentence reports are an exception. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 171. *In State v. Glenn* (1986), 28 Ohio St.3d 451, 458, the supreme court, finding error in the presence of hearsay witness statements in a presentence report, held that the permissible content of the report is limited to information which is "directly relevant to the aggravating and mitigating circumstances." *Glenn, supra,* at paragraph two of the syllabus. Irrelevant information should be excised, *id.* at 459-460, though it remains an open question whether a defendant may withdraw the entire report once it has been prepared. *Id.* at 460, fn. 2. Neither excision nor withdrawal was requested in this case.

A defendant may not challenge the inclusion of relevant, though prejudicial, material in a presentence report. As noted by the supreme court in *State v. Buell* (1986), 22 Ohio St.3d 124, 138:

"* * * [T]he defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations * * *. There is no constitutional infirmity in providing the defendant with such an option. Additionally, the jury should be privy to all information relevant to its task of deciding whether a defendant should be sentenced to life in prison or whether it should recommend that the defendant be put to death." See, also, *State v. Steffen* (1987), 31 Ohio St.3d 111, 121.

A capital defendant's criminal record may be pertinent to the statutory mitigating factor set forth in R.C. 2929.04(B)(5):

"* * * [T]he court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications."

Significantly, the provision limits the relevancy of a criminal record to actual "convictions" and "delinquency adjudications." This language plainly entitles a defendant to argue in mitigation that he has no significant history of such dispositions without requiring him to explain away instances when he was released, the charges were dismissed, or he was acquitted outright. These dispositions thus are not "directly related" to the mitigating factor, and the syllabus law of *Glenn, supra,* mandates that they cannot be revealed to the jury.

Nor is the information admissible as pertinent to the jury's duty to consider Hutton's "history, character, and background." Initially, I believe we should be reluctant to invoke such generalities to expand upon the specific denotation of criminal convictions and delinquency adjudications-the most reliable evidence of a criminal background. Such an interpretation would render subdivision (B)(5) meaningless, and would be contrary to the maxim of statutory construction, "Expressio unius est exclusio alterius" (the mention of one thing implies the exclusion of another). This maxim is not a rule of law but an aid in determining the legislative intent.

State, ex rel. Jackman, v. Court of Common Pleas of Cuyahoga City. (1967), 9 Ohio St.2d 159, 164. However, since the admission of a defendant's every brush with the law, as part of his "history" or "background," could effectively deny consideration of the statutory mitigating factor, application of the maxim is appropriate here.

***36** Moreover, we should not lose sight of the fact that R.C. 2929.04(B) governs the admission of *mitigating,* not aggravating, evidence. Some prejudice is perhaps unavoidable; division (B) is mandatory in directing the jury to consider all the matters listed therein. Indeed, the supreme court has rejected claims of prejudice from the sentencer's express consideration of the heinous character of the crime. Such consideration, the court reasoned, was part of the sentencer's duty to consider the "nature and circumstances of the offense" to determine whether any mitigating aspect could be extracted. See *Steffen, supra,* at 117; *State v. Byrd* (1987), 32 Ohio St.3d 79, 81.

However, the provisions at issue cannot be so easily reconciled. The sentencer's duty to consider a capital defendant's background must be harmonized with its duty to weigh a defendant's lack of a significant history of criminal convictions and delinquency adjudications. The potential conflict can only be resolved in favor of preserving the specific statutory mitigating factor set forth in subdivision (B)(5).

I recognize that in non-capital cases the sentencing judge may be advised of and consider mere arrests. *State v. Burton* (1977), 52 Ohio St.2d

21, 23; *Maple Hts. v. Dickard* (1986), 31 Ohio App.3d 68, 71. However, there is a distinct difference between providing such information to a trial judge, who is presumably able to discount the inflammatory nature of the information, and supplying it to a jury of lay persons in a capital case. Indeed, the only guidance the jury received when this material was first revealed came from the prosecutor, who interpreted the import of the notation, "released," as it applied to three of Hutton's arrests:

"Caught a couple of breaks. [Tr. 2394].

"Another break.

"How many times do they have to pat this guy on the back?" (Tr. 2395).

The prosecutor concluded:

"The defendant has had more than enough breaks by the system, throughout his youth and his adult life, and he has refused to take advantage of them." (Tr. 2397).

Defense counsel attempted to explain to the jury that the notation, "released," did not necessarily mean the suspect received a "break." (Tr. 2401). Counsel acknowledged the difficulty in his endeavor since he-presumably like the prosecutor-had no knowledge of the underlying facts.

***37** I believe it is immaterial that Hutton did not actually attempt to assert his criminal history as a mitigating factor. Hutton's strategy had no bearing on the permissible contents of the presentence report since, under *Buell, supra,* a report cannot be edited to include only information favorable to the

defendant. Rather, the subject matter of a presentence report is dictated by the information's relevance to aggravating and mitigating factors. *Glenn, supra.* In the case at bar, the only dispositions which were properly contained in the report were convictions and delinquency adjudications, and the jury's only concern was whether these notations demonstrated an absence of a significant history of such dispositions.

The inclusion of irrelevant information in a presentence report is not reversible error *per se.* Although the supreme court has not yet addressed this specific issue, the court, on several occasions, has been faced with other defects in a capital jury's deliberative process. See *Jenkins, supra,* at 197-200 (duplicative aggravating circumstances); *State v. Johnson* (1986), 24 Ohio St.3d 87, 92-94, and *State v. Penix* (1987), 32 Ohio St.3d 369, 371-372 (non-statutory aggravating circumstances); and *Glenn, supra* (hearsay in presentence report). In each of these cases the court examined the irregularity for its effect on the statutory balancing procedure. The ultimate inquiry must be whether the defect " 'impermissibly tips the scales in favor of death, and essentially undermines the required reliability in the jury's determination.' " *Penix, supra,* at 371, quoting *Johnson, supra,* at 94.

In *Glenn, supra,* the supreme court analyzed the issue in the context of a presentence report which contained unsworn witness statements. The court concluded the error was harmless because appellant retained the right to call and cross-examine the witnesses; the trial court had given appellant the opportunity to withdraw the report; and the

independent appellate review demonstrated that the aggravating circumstances outweighed the mitigating factors to "an overwhelming degree." *Id.* at 460.

I believe the inclusion of the irrelevant criminal history, accompanied by the prosecutor's commentary, tainted the jury's determination.[1] In this case, unlike *Glenn,* Hutton lacked the ability to rebut the irrelevant data, and was not given an opportunity to withdraw the report. Most importantly, the criminal record carried with it an inflammatory quality that cannot be gauged on appellate review. The inclusion of the pending rape and kidnapping charges, which lent credence to the inadmissible "other acts" evidence, was patently prejudicial. While this court conceivably could weigh the factors and circumstances divorced from the tainted evidence, to do so would be to ignore Hutton's right to a reliable jury determination in the first instance. The supreme court commented in *Penix, supra,* at 373:

"The role of the jury is integral to the sentencing process in death penalty cases. While a recommendation by the jury that the death penalty

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[1] I note, too, that the report of the court psychiatric clinic erroneously states that Hutton had been convicted of murder, kidnapping and other offenses in 1977. The report explains that Hutton "appealed the case, and was released from prison after two years." The convictions were actually for voluntary manslaughter and abduction, and Hutton was "released from prison" because this court reversed his convictions. Such misstatement in any trial, let alone a capital murder case, is inexcusable.

be imposed must be reviewed and reweighed by the trial and appellate courts, a jury decision to impose life imprisonment is final."

***38** I thus conclude defense counsel's failure to object to the prosecutor's characterization of Hutton's criminal record, as well as his failure to move for excision of the irrelevant dispositions, was a prejudicial, "substantial violation of an essential duty" owed to Hutton. *State v. Lytle* (1976), 48 Ohio St.2d 391, paragraph one of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668. I respectfully disagree with Judge Matia, however, that defense counsel's mere request for a presentence report constituted ineffective assistance of counsel. Nevertheless, on the narrower ground discussed above, I concur that defense counsel was deficient during the penalty phase, and that the sentence of death must be vacated. See *Johnson, supra,* at 94.

I agree that the trial court erroneously restricted Hutton's recross-examination of the state's witness, Mary Etta Pollard, but I disagree that this error requires reversal of the convictions.

During cross-examination, defense counsel initiated an inquiry into Hutton's character:

"Q. Isn't it a fact that you have never known the defendant to have been violent towards someone?

"A. Never" (Tr. 1592).

On redirect examination, the prosecutor challenged her assertion:

"Q. Now, Mrs. Pollard, isn't it a fact that you know Percy Hutton took the life of someone?

"MR. HILL: Objection.

"THE COURT: Overruled.

"A. Yes, I heard of it.

"Q. If someone takes the life of another, don't you consider that an act of violence?

"A. It is according to the circumstances. Yes, it is an act of violence, but if you are protecting yourself, you have to protect yourself any kind of way, you have to know how to protect yourself. I can't just see someone going out and shooting someone or killing someone. I think, yes, that's an act of violence.

"Q. Now, isn't is a fact that you also know that this defendant, Percy Hutton, committed armed robbery?

"A. No, I don't know that as a fact.

"Q. Would you consider armed robbery to be an act of violence?

"A. Yes." (Tr. 1598-99).

Defense counsel pursued the inquiry on recross-examination:

"Q. * * * Isn't it a fact that when you heard about this, that there was more to it than just the fact of him having taken someone's life?

"MS. HARBER: Objection.

"A. Yes.

"THE COURT: Objection will be sustained. The answer will be stricken. The jury is instructed to disregard that answer.

"Q. Can you tell us, in connection with this incident that you just testified about, what is it that you heard?

"MS. HARBER: Objection.

"THE COURT: Sustained.

"MR. HILL: No further questions." (Tr. 1600).

Evid.R. 404(A) generally prohibits the use of character evidence to prove conduct on a specific occasion. However, in an exception to this rule, subdivision (1) permits a criminal defendant to offer such evidence of his own character. Evid.R. 405 requires the defendant to introduce the evidence by reputation or opinion testimony; on cross-examination, the state may inquire into specific instances of conduct.

***39** I do not agree that the prosecutor's queries constituted misconduct. Hutton's counsel clearly attempted to convert Pollard into a character witness for the defense. Having done so, Hutton cannot complain of the state's impeachment of Pollard's perception by reference to her knowledge of specific instances of violent conduct attributed to Hutton. See *State v. Sims* (1981), 3 Ohio App.3d 321, 323-324. Prejudice is inherent in such rebuttal testimony and is a risk a defendant takes by presenting character evidence. See *Michelson v. United States* (1948), 335 U.S. 469. Although a limiting instruction would have been appropriate, *id.* at 472, 484-485, it was Hutton's burden to request one. Evid.R. 105. Cf. *State v. Gordon* (1971), 28 Ohio St.2d 45, 51.

Hutton contends the query whether Pollard knew Hutton "took the life of someone" was improper since

the criminal convictions resulting from the incident were reversed on appeal. I disagree. The prosecutor carefully limited his inquiry to the underlying conduct rather than the criminal adjudication. Strictly speaking, the prosecutor's question was factually accurate. Since he properly could inquire about incidents of violence from which no criminal charges flowed, the reversal of Hutton's convictions stemming from that incident is immaterial. See *Sims, supra,* at 323 (allowing inquiry about defendant's unrelated arrest to impeach character witness).

The trial court's limitation of Hutton's recross-examination raises a more troubling issue. Although defense counsel's initial inquiry on cross-examination did not call for opinion or reputation testimony, as required by Evid.R. 405(A), no objection was raised. The court properly sustained the prosecutor's first objection on recross-examination because the question was leading. Although leading questions are generally permitted on cross-examination, Evid.R. 611(C), Pollard was, in effect, Hutton's witness at that point.

It is not as apparent why the court sustained the second objection. Although the question could perhaps have been framed more precisely, it is clear counsel was attempting to elicit Pollard's reasons for discounting the prosecutor's examples of Hutton's violent conduct. The question did not call for hearsay since its relevance lay not in the truth of whatever she heard, but in its effect upon her opinion.

I conclude that, while the court's limitation was improper, it did not rise to the level of prejudicial error. Pollard was partially able to explain her opinion, and her character testimony would not, in any event, have significantly benefited Hutton's defense. Because the court's error was harmless beyond any reasonable doubt, this assignment of error must be overruled.

I cannot concur in Judge Matia's disposition of Hutton's eighth assignment of error, which challenges the denial of Hutton's Crim.R. 29 motions for acquittal. Our review is limited to the Mitchell kidnapping and murder convictions since trial counsel expressly waived a sufficiency challenge to the counts arising from the Simmons shooting. (Tr. 1801-1802). Although the convictions for Mitchell's kidnapping and murder were merged for sentencing, the kidnapping conviction must be reviewed because it is an element of one of the aggravated murder convictions as well as a death penalty specification.

***40** I believe the state presented sufficient evidence to support both the kidnapping and murder counts. Approximately one week before the evening at issue, Hutton told Mitchell and Simmons he would kill them both if he learned they stole the sewing machine. A jury could reasonably find this motive compelled Hutton to shoot Simmons. The expert ballistics testimony showed it was possible that Mitchell and Simmons were shot with the same gun. Before shooting Simmons, Hutton had held a gun to Mitchell's head when they stopped at the bus lot. Mitchell was last seen alive when he left the hospital with Hutton, who later told Eileen Sweeney that Mitchell "wasn't coming back."

A reviewing court will not reverse a conviction on sufficiency grounds if the evidence would permit reasonable minds to differ as to whether the state proved each element of the offense beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus.

The state theorized at trial that Hutton kidnapped Mitchell by deception to facilitate his murder. (Tr. 2142, 2280). See R.C. 2905.01(A)(2). Conversely, one of Hutton's aggravated murder convictions, charged in the second count of the indictment, is felony murder based on the kidnapping.

The evidence reasonably permits a finding of kidnapping by deception. Simmons testified that Hutton told Mitchell on the way to the hospital that someone came out of the house and shot Simmons. (Tr. 973-974). When Mitchell left the hospital with Hutton and Laster, he believed that they were on their way to "get" the person who shot Simmons. (Tr. 974-975). The jury could reasonably have found Hutton instilled Mitchell's belief, and that, consistent with the preceding events that evening, Hutton instead intended to kill him.

In addition to felony murder, Hutton was convicted of aggravated murder, as charged in the first count of the indictment, under a theory of prior calculation and design. See R.C. 2903.01(A). The same evidence outlined above supports a finding that Hutton killed Mitchell with "some kind of studied analysis with its object being the means by which to kill." *State v. Jenkins,* (1976), 48 Ohio App.2d 99, 101-102. See, also, *State v. Davis* (1982), 8 Ohio

App.3d 205, 206-207. I would thus affirm the court's ruling under this theory as well.

I cannot concur in Judge Matia's disposition of Hutton's fifth assignment, which challenges the admission of a series of photographs of Mitchell's body into evidence.

The supreme court has adopted a strict standard governing the admissibility of photographs in capital cases:

*41 "To be admissible in a capital case, the probative value of each photograph must outweigh the danger of prejudice to the defendant and, additionally, not be repetitive or cumulative in nature. Contrary to the Evid.R. 403 standard, where the probative value must be minimal and the prejudice great before the evidence may be excluded * * * if the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant, the evidence must be excluded." *State v. Morales* (1987), 32 Ohio St.3d 252, 258. See, also, *State v. Maurer* (1984), 15 Ohio St.3d 239, paragraph seven of the syllabus.

In this case the state introduced ten photographs of Mitchell's decomposed, maggot-infested corpse. These photographs were relevant, the state urges, for identification purposes and to illustrate the time and manner of Mitchell's death.

I disagree. Hutton did not contest the identification of Mitchell's body. Indeed, defense counsel did not even cross-examine Dr. Benjamin Kaufman, a consultant for the county coroner's office,

who positively identified the body through a comparison of x-rays.

Neither of Mitchell's bullet wounds is clearly discernible in any of the photos. Because of the state of decomposition, the deputy coroner was unable to locate one of the entrance wounds. In any event, Hutton did not challenge the prosecution's version of the cause of death.

The exhibits graphically illustrate that, consistent with the deputy coroner's testimony, Mitchell had been dead some time before his body was discovered. However, it was hardly necessary to use ten photographs to prove this point.

Prejudice from the admission of the photos was inevitable. Although the gruesome nature of a photograph will not render it *per se* inadmissible, *Maurer, supra,* at 265, there must be a counterbalancing probative value. While the prejudice may have been mitigated somewhat by the jury's probable recognition that Hutton did not cause the advanced decomposition of Mitchell's body, I believe the prejudice was nonetheless sufficient to outweigh the meager probative value.

The photos were also cumulative in nature and most, if not all of them, should have been excluded on that ground. *Morales, supra.* See, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 9. For example, state's exhibits 17, 18 and 19 depict virtually the same view of Mitchell's body on the coroner's table. Exhibits 16 and 29 repetitively depict a close-up view of Mitchell's skull. Because the quantity of the photos added nothing to their dubious probative value, exclusion was warranted.

PATTON, Judge, dissenting:

*41 A majority of this panel believes that appellant's fourth and thirteenth assignments of error are well taken. I do not agree that error, let alone reversible error, intervened in either the guilt or penalty phases of this case, and thus I cannot agree that appellant's fourth or thirteenth assigned errors have merit. Accordingly, I must respectfully dissent from the majority's reversal of this conviction and sentence based on those two assignments of error.

I.

The majority finds merit in the appellant's fourth assignment of error pertaining to the alleged "other acts" evidence testified to by Eileen Sweeney. I am not persuaded that the admission of this evidence violated Evid.R. 404(B) or its statutory counterpart, R.C. 2945.59, or that it gave rise to prejudicial error.

*42 The majority concedes that it was not improper for Ms. Sweeney to testify to appellant's declaration that Ms. Sweeney should forget about Mr. Mitchell because he would not be coming back. The majority also acknowledges that Ms. Sweeney could testify to having seen appellant possess a handgun with a white handle when he took her to Fairhill Park. Nevertheless, the majority believes that the testimony concerning the alleged sexual assault was inadmissible as "other acts" evidence and that this testimony deprived appellant of a fair trial. I cannot agree.

Evidence Rule 404(B) generally proscribes the use of other crimes, wrongs or acts independent of the

offense for which the defendant is on trial where that evidence is used to demonstrate that the defendant has a propensity for crime or that his character is in conformity with the other acts. See *State v. Mann* (1985), 19 Ohio St.3d 34, paragraph one of the syllabus. See also *State v. Zuern* (1987), 32 Ohio St.3d 56, 59. But this general rule of exclusion does not apply where the evidence of another crime is relevant to prove the accused's guilt of the crime charged or to connect him with it, and the evidence is not offered merely to show propensity or disposition on the accused's part to commit the crime. See *State v. Watson* (1971), 28 Ohio St.2d 15, 21 (constructing R.C. 2945.59). In *State v. Wilson* (1982), 8 Ohio App.3d 216, this Court recognized that the listing of permissible uses of evidence as set forth in the second sentence of Evid.R. 404(B) is illustrative, but not exhaustive or exclusive, and thus "a party may sometimes introduce 'other acts' evidence, although the purpose for its admission is not enumerated in Evid.R. 404(B)." *Wilson*, 8 Ohio App.3d at 219. See also 2 Weinstein and Berger, Weinstein's Evidence (1986) 404-54 to 404-56, Paragraph 404[08] and cases cited therein.

One recognized permissible use of such evidence is "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." McCormick, Evidence (3d Ed. Cleary Ed. 1984) 558, Section 190. This use is consistent with prior Ohio caselaw. In *State v. Thompson* (1981), 66 Ohio St.2d 496, the Ohio Supreme Court stated:

"Other acts" testimony is relevant and, thus, admissible, under the "scheme, plan or system"

exception of R.C. 2945.59 where those acts form part of the immediate background of the crime charged, and hence are "inextricably related" to the act alleged in the indictment; that is, where the challenged evidence plays an integral part in explaining the sequence of events and is necessary to give a complete picture of the alleged crime.

Id. at 498. In *State v. Wilkinson* (1980), 64 Ohio St.2d 308, the court explained that "the jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void-without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *Id.* at 317 (quoting *United States v. Roberts* (C.A.6, 1977), 548 F.2d 665, 667, *certiorari denied,* 431 U.S. 931). Thus, "evidence of other crimes may be presented when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged." *Wilkinson,* 64 Ohio St.2d at 317.

***43** I agree that evidence of other bad acts may not be admitted to prove that the individual is a bad person who is prone to commit crimes, including the one for which he stands charged. But in the instant case, Ms. Sweeney's testimony was not offered to show that appellant was prone to commit crimes, but instead was offered to explain the sequence of events between the time that Ms. Sweeney learned that Derek Mitchell was in danger and the time that appellant ultimately released Ms. Sweeney. This does not fall within the proscription against "other acts" evidence contained in Evid.R. 404(B). For example, in *State v. Buck* (1982), 3 Ohio App.3d 349,

where the defendant was charged with felonious assault against police officers, the court rejected the argument that "other acts" evidence was improperly admitted where the evidence disclosed the defendant had threatened several people before the police arrived to investigate a domestic violence report. The court held that the jury was entitled to "the complete picture" of what occurred, notwithstanding that the "other acts" could constitute separate offenses. Such evidence is admissible because it explains and connects a chain of events resulting directly in the arrest of the defendant. See *State v. Gonzalez* (May 17, 1984), Cuyahoga App. No. 47216, unreported, slip op. at 6.

The facts of this case provide a compelling illustration of evidence that is necessary to put the sequence of events in context. At approximately 2:30 a.m., Ms. Sweeney was taken to St. Luke's Hospital by the appellant, in the company of Bruce Laster and the victim Derek Mitchell, presumably to learn whether Samuel Simmons, Jr. was still alive in spite of the gunshot wounds to his head. When Ms. Sweeney arrived at Simmons' room, she discovered that he was alive. Simmons told her that he had been shot by appellant and that she should tell Mr. Mitchell to get out of the appellant's car immediately because they were going to kill him. Ms. Sweeney left Simmons and ran to the hospital's parking lot to relay Simmons' message to Mitchell, but the car was gone. Appellant and Laster returned within thirty minutes, but they were without Mr. Mitchell. Appellant told Ms. Sweeney that they had taken Mr. Mitchell home. Ms. Sweeney entered the car on appellant's assurance that he would take her home,

but appellant instead drove to Fairhill Park. Once there, appellant told Ms. Sweeney to forget about Mr. Mitchell because he was not coming back. Ms. Sweeney observed that appellant possessed a handgun with a white handle, which corroborated Mr. Simmons' testimony. Ms. Sweeney testified that appellant then raped her. Thereafter, appellant warned Ms. Sweeney not to tell anyone what had transpired and that if Ms. Sweeney did disclose anything, then "someone" would be looking for her. Shortly after 4:00 a.m., the appellant and Laster drove Ms. Sweeney to LaWanda Mitchell's house, where she was released.

The majority would seemingly allow Ms. Sweeney to testify that she was with appellant for an undetermined period of time, during which she saw the gun and heard appellant's incriminating remarks. The majority would not allow Ms. Sweeney to explain that appellant detained her against her will from the time she re-entered appellant's car at the hospital until she was released at LaWanda Mitchell's house. By excluding evidence explaining the immediate sequence of events, the majority would put Ms. Sweeney's testimony in a vacuum and allow the jury to speculate as to why she would accompany appellant for an unspecified period of time even though she had reason to believe that appellant had harmed Mr. Mitchell. A shrewd defense counsel would not inquire on cross-examination as to Ms. Sweeney's reasons for remaining with appellant, but could effectively defile her before the jury during closing arguments in order to impeach her testimony. At that point, there would be no opportunity for Ms. Sweeney to testify to the

actual sequence of events. In my view, the admission of Ms. Sweeney's testimony violated neither the letter nor the spirit of Evid.R. 404(B).

*44 Under these circumstances, I cannot agree that Ms. Sweeney's testimony concerning the alleged rape should have been excluded. Her testimony was highly probative of evidence linking appellant with the murder because it explained the circumstances during the critical period of time immediately after she last saw Mr. Mitchell. Contrast *State v. Curry* (1975), 43 Ohio St.2d 66, 73 ("other acts" evidence occurring five months apart were "chronologically and factually separate occurrences"). These facts do not allow for a neat severance of separate and distinct events, but instead reflect a continuing course of conduct from the time of the deceased's disappearance until appellant's final intimidating threat to Ms. Sweeney that "someone" would be looking for her if she disclosed the events of the evening.

Moreover, I am not persuaded that the probative value of Ms. Sweeney's testimony was substantially outweighed by its prejudicial effect. See Evid.R. 403(A). In *State v. Zuern* (1987), 32 Ohio St.3d 56, an aggravated murder case, the court found no merit in the contention that prejudicial error occurred when a witness remarked that the defendant was already in prison for murder. *Id.* at 58-61. When the reference to a prior murder charge in *Zuern* does not produce reversible error, it is difficult to see how Ms. Sweeney's allegation of rape can constitute prejudicial error. Moreover, the trial court in the instant case gave careful limiting instructions before

and after Ms. Sweeney's testimony to minimize any inflammatory effect. (Tr. 1181-82, 1332).

In light of the foregoing, I am convinced that Ms. Sweeney's testimony was properly allowed and was not violative of the proscription against "other acts" evidence contained in Evid.R. 404(B). Even if portions of her testimony were objectionable, I cannot agree that such testimony constituted reversible error. "Close evidentiary questions are within the domain of the trial court." *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 223. In my opinion, the trial court did not err in admitting Ms. Sweeney's testimony. Accordingly, I would overrule appellant's fourth assignment of error.

II.

The majority also concludes that reversible error occurred during the sentencing phase of this case as a result of the disclosure of information contained in appellant's presentence report. The majority concludes that appellant was denied effective assistance of counsel when appellant's trial counsel requested a presentence report that included a summary of appellant's prior arrests and/or convictions. The majority thus finds merit in the thirteenth assignment of error. I cannot agree with the majority's conclusions.

***45** At the outset, it should be noted that to support his claim that he was denied effective assistance of counsel, appellant's brief asserts, among other things, that his trial counsel failed to object during the prosecution's closing remarks. Appellant does not complain about the admission of the presentence report itself. Nevertheless, one

member of the majority now concludes that counsel rendered ineffective assistance simply by requesting a presentence report, while another member of the majority concludes that counsel was ineffective when he failed to move to excise certain information from appellant's presentence report. In my view, the foregoing arguments are not persuasive.

With regard to the prosecution's closing remarks, the general rule is that some latitude is granted to both parties in closing argument. See *State v. Byrd* (1987), 32 Ohio St.3d 79, 82. "[T]he conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial." *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. In the instant case, counsel did not register an objection to the State's closing argument. Absent plain error, the failure to object to closing remarks ordinarily precludes a subsequent complaint about that argument on appeal. See *Snyder v. Stanford* (1968), 15 Ohio St.2d 31; *Cleveland v. Egeland* (1986), 26 Ohio App.3d 83. Instead of finding that the prosecutor's remarks were plain error in this case, the majority attempts to rest its conclusion on the claim that appellant was denied effective assistance of counsel. The majority's reasoning is unconvincing.

With regard to the claim of ineffective assistance of counsel, the majority correctly notes that the appellant must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. See *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Lytle* (1976), 48 Ohio St.2d 391. Judicial review of counsel's performance must be highly deferential,

and a reviewing court must make every effort to eliminate the distorting effect of hindsight. *Strickland v. Washington,* 466 U.S. at 689; *State v. Post* (1987), 32 Ohio St.3d 380, 388.

In the instant case, appellant requested that a presentence report be prepared for the sentencing phase of this case, pursuant to R.C. 2929.03(D)(1). Included in the presentence report was a summary of appellant's prior arrests and/or convictions for both his juvenile and adult life. In *State v. Steffen* (1987), 31 Ohio St.3d 111, the court observed that only the defendant can request that a presentence report be prepared. *Id.* at 121. Thus, " * * * the defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. * * * [T]he jury should be privy to all information relevant to its task of deciding whether a defendant should be sentenced to life in prison or whether it should recommend that defendant be put to death." *Steffen,* 31 Ohio St.3d at 121 (quoting *State v. Buell* (1986), 22 Ohio St.3d 124, 138). The fact that a presentence report contains information that might not be admissible during the guilt phase of a capital prosecution is not of itself a basis for a finding of error in the sentencing phase. See *State v. Glenn* (1986), 28 Ohio St.3d 451, 459.

Judge Matia believes that counsel's mere request for a presentence report constituted ineffective assistance of counsel. I agree with Judge McManamon to the extent that she rejects that the mere request for a presentence report constituted ineffective assistance of counsel. A presentence report may contain both favorable and unfavorable information on a defendant, but the fact that the

report contains some unfavorable information does not by itself establish that counsel was not acting as the "counsel" guaranteed by the Sixth Amendment when the presentence report was requested. Indeed, it is not inconceivable that counsel could be accused of being incompetent if he did not request a presentence report. In my view, the conclusion that the disclosure of unfavorable information by itself demonstrates that counsel was ineffective misapprehends the correct scope of review of counsel's performance by failing to give due deference to the presumed competence of counsel.

***46** I am also unable to join in Judge McManamon's analysis of appellant's claim that he was denied effective assistance of counsel during the penalty phase. Judge McManamon focuses on the admissibility in a presentence report of references to appellant's previous arrests that did not result in either a conviction or a delinquency adjudication. In my view, the issue here is not whether it was error under the law of evidence to admit these prior arrests. Contrast *State v. Post* (1987), 32 Ohio St.3d 380, 382-84 (challenging admissibility of victim impact statement in presentence report); *State v. Steffen* (1987), 31 Ohio St.3d 111, 121-22 (challenging admissibility of presentence report); *State v. Glenn* (1986), 28 Ohio St.3d 451, 459-60 (challenging admissibility of hearsay statements in presentence report). Instead, the only issue is whether trial counsel's failure to object to the presentence report was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and whether counsel's failure to object prejudiced appellant's defense. See *Strickland*

v. Washington, supra; State v. Lytle, supra. The record in this case does not support either component of an ineffectiveness claim.

Initially, it is not necessary to determine whether counsel's performance in this regard was deficient since there is no indication that appellant was prejudiced by counsel's alleged deficiency. See *Strickland v. Washington,* 466 U.S. at 697. To establish that he has been prejudiced by counsel's representation, the appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* 466 U.S. at 694.

In this case, there has been no showing that in the absence of some or all of appellant's presentence report, there is a reasonable probability that the jury would have found that the aggravating circumstance did not outweigh the mitigating factors. The State proved by proof beyond a reasonable doubt that the murder of Derek Mitchell was a part of a course of conduct involving the purposeful attempt to kill two or more persons. See R.C. 2929.04(A)(5). Against this aggravating circumstances must be weighed all the mitigating factors drawn from (1) the nature and circumstances of the offense; (2) the history, background and character of appellant; and (3) any of the factors listed in R.C. 2929.04(B)(1) through (7) which exist in this case. See *State v. Post,* 32 Ohio St.3d at 394. After considering the circumstances of this case, I am not persuaded that there is a reasonable probability of a different outcome even if appellant's presentence report is disregarded. Under

these circumstances, it cannot be said that counsel's failure to excise some portions of the presentence report prejudiced appellant's defense. Cf. *State v. Glenn* (1986), 28 Ohio St.3d 451, 459-60 (improper statements in presentence report did not affect mitigation phase of trial where aggravated circumstances overwhelmingly outweighed mitigating factors).

Moreover, I am not persuaded that counsel's performance fell outside the wide range of reasonable professional assistance such that counsel's representation was constitutionally deficient. Appellant requested that a presentence report be prepared, pursuant to R.C. 2929.03(D)(1). Under Ohio's sentencing scheme, the trial jury must consider the presentence report as it weighs the aggravating circumstances against any mitigating factors present in the case.

***47** In *State v. Glenn* (1986), 28 Ohio St.3d 451, a presentence report was introduced during the mitigation phase of an aggravated murder trial that included witness statements to the police and different versions of the crime taken from police reports that tended to undermine the impartiality of the report. The court found the inclusion of those statements to be harmless error under the circumstances of that case. *Glenn*, 28 Ohio St.3d at 460. Without specifying what a presentence report should or should not contain, the *Glenn* court admonished that a presentence report "should include only such information as is directly relevant to the aggravating and mitigating circumstances." *Glenn*, paragraph two of the syllabus.

In the instant case, appellant's presentence report included a summary of appellant's prior record for his juvenile and adult life. The report indicated whether appellant was adjudicated delinquent or whether he was found guilty of the charged offense. The report also indicated whether appellant had been released or if there had been no disposition in the case or if charges remained pending against him. Although there was no notation on the presentence report itself, both the prosecutor and appellant's trial counsel explained that one of appellant's adult convictions had been reversed on appeal. (Tr. 2396; 2400-2401).

There is no suggestion in this case that appellant's prior criminal record was considered as a non-statutory aggravating circumstance. But see *Barclay v. Florida* (1983), 463 U.S. 939 (held: death sentence valid despite trial court's consideration of defendant's prior record, in violation of state law). Instead, in the instant case, the concurring opinion concludes that it was reversible error for the presentence report to refer to any previous charge against appellant that did not result in an actual conviction or delinquency adjudication. But the purpose of the mitigation phase of an aggravated murder trial is for the sentencer to acquire a more thorough knowledge of the defendant's character and history to determine whether any mitigating factors militate against imposing the sentence of death. See *Williams v. New York* (1949), 337 U.S. 241; *State v. Barker* (1978), 53 Ohio St.2d 135, 150-51. A bare recital of the defendant's prior convictions and delinquency adjudications hardly provides the

sentencer with a complete profile of the individual defendant.

In *State v. Burton* (1977), 52 Ohio St.2d 21, the court observed:

[I]t is well-established that a sentencing court may weigh such factors as arrests for other crimes. As noted by the Second Circuit United States Court of Appeals, the function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it. The court's consideration ought to encompass negative as well as favorable data. Few things can be so relevant as other criminal activity of the defendant. "To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions."

***48** *State v. Burton*, 52 Ohio St.2d at 23 (quoting *United States v. Doyle* (C.A.2, 1965), 348 F.2d 715, 721, *certiorari denied*, 382 U.S. 843). While I acknowledge that the sentence of death is qualitatively different from other sentences ordinarily imposed by a court, I see no reason why prior arrests may be considered by a sentencer in a non-capital case but cannot be considered in a capital case as part of "the history, character, and background of the offender," R.C. 2929.04(B), particularly if the offender attempts to offer his insubstantial prior criminal history as a mitigating factor, R.C. 2929.04(B)(5). In an appropriate case, the sentencer may accord great weight to the absence of a significant history of prior criminal convictions and delinquency adjudications. But excluding

charges that did not result in a conviction or delinquency adjudication precludes the sentencer from acquiring an accurate understanding of the offender's history and background and frustrates the requirement that sentencing be guided and channeled by a system that focuses on the circumstances of each individual homicide and each individual defendant. *Zant v. Stephens* (1983), 462 U.S. 862, 879; *Proffitt v. Florida* (1976), 428 U.S. 242, 258.

Finally, the majority undervalues the function of the trial judge, who actually imposes the sentence under Ohio's statutory sentencing scheme. In this case, the sentencing jury's function was to recommend the appropriate sentence. See R.C. 2929.03(D)(2). The ultimate responsibility rests with the sentencing judge. See R.C. 2929.03(D)(2)-(3). An offender's presentence report ordinarily is not submitted to a jury other than when requested by the offender in a capital case. See *State v. Glenn* (1986), 28 Ohio St.3d 451, 459; R.C. 2929.03(D)(1). However, presentence reports are not unfamiliar to our trial judges. See Crim.R. 32.2. The trial judge is in the best position to check a sentencing jury that may have misused information contained in the offender's presentence report. While the mere presence of a trial judge may not be an absolute guarantee against the arbitrary imposition of the death penalty, I am convinced that the trial judge is particularly well suited to giving the appropriate weight to the information contained in the offender's presentence report. The sentencing judge thus acts as a check on a sentencing jury that has been misled

or that has given undue consideration to the presentence report.

Thus, where the information contained in appellant's presentence report was relevant to determine whether any mitigating factors were present in this case, I cannot see how counsel's failure to object to some portions of that presentence report can be considered as ineffective assistance of counsel. But even if I agreed that the contents of a presentence report should be limited to some extent, I cannot agree that counsel's failure to move for excision of some of appellant's prior charges fell below an objective standard of reasonableness and so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. at 686, 688. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. In this case, appellant was not denied the effective assistance of reasonably competent counsel.

***49** Accordingly, I would overrule appellant's fourth and thirteenth assignments of error and affirm the conviction and sentence.

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No. 16-1116

IN THE SUPREME COURT OF THE UNITED STATES

CHARLOTTE JENKINS, Warden,
PETITIONER,

v.

PERCY HUTTON,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that manifest injustice justified lifting the procedural default imposed by the state courts.

2. Whether the Court of Appeals correctly applied clear Eighth Amendment law in finding that failure to instruct the jury regarding aggravating circumstances left the jury with unguided and unfettered discretion to impose a death sentence.

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INTRODUCTION

The Warden's Petition for a Writ of Certiorari is based on improper assertions of Ohio law, mischaracterizations of the Court of Appeals's opinion, and basic misunderstandings of Eighth Amendment law.

This Court has repeatedly emphasized that it does not engage in error correction, particularly where the asserted errors are based on the lower court's purported failure to assess the facts correctly. *See* Sup. Ct. R. 10. Such review is especially unwarranted here, where the alleged factual errors are based solely on Petitioner's mischaracterization of the record.

For these reasons, the Petition should be denied.

STATEMENT OF THE CASE

There is no dispute that Mr. Hutton's jury was never instructed on the limitations of circumstances that it could consider in favor of death. While the jury was instructed about the definition of mitigating factors there was no similar instruction defining the aggravating circumstances. As such, the jury was given unfettered discretion to impose a death sentence by considering anything the jury deemed "aggravating" as a circumstance that warranted a death sentence.

Although the Warden repeatedly refers to "aggravating circumstance" in her Petition and properly states the parameters of Ohio law regarding "aggravating circumstances," the jury was never instructed on aggravating circumstances. This error began with the indictment in which the Prosecutor presented to the grand jury indictment forms that referred to "Specification" not aggravating circumstance. Not only did the indictments not inform the trial jury about the definition of "aggravating circumstances" but the indictments specifically included "Specifications" that could not be considered at the sentencing proceeding in weighing

"aggravating circumstances" against mitigating factors. Counsel for the Warden might understand the limitation of aggravating circumstances, the difference between a specification in the indictment and an aggravating circumstance at sentencing, and the nuances and intricacies of capital sentencing proceedings and the weighing process, but Hutton's jurors were not capital litigators or even lawyers. Because the jurors were regular people selected for the awesome responsibility of deciding whether a fellow human being should die or live, it was incumbent on the trial court to properly instruct and guide the jury's discretion through its decision-making process. This did not occur.

The Grand Jury returned indictments charging Bruce Laster and Percy Hutton with two counts of Aggravated Murder. Count 1 alleged Aggravated Murder (purposeful and with prior calculation and design) with Specification 1 (use of a gun), Specification 2 (course of conduct killing or attempting to kill two people), and Specification 3 (committing a murder while committing a felony). Count 2 alleged Aggravated Murder (purposeful killing while committing a kidnapping) with Specification 1 (use of a gun), Specification 2 (course of conduct killing or attempting to kill two people), and Specification 3 (committing a murder while committing a felony). Although not defined in the indictments on Specifications 2 and 3 would qualify as aggravating circumstances for a capital sentencing proceeding.

The matter then proceeded to trial. There is no dispute that at no point during the trial was the jury ever told that the "Specification" in the indictments were in any way related to the "aggravating circumstances" at the sentencing proceedings.

The Warden attempts to fabricate an instruction to the jury by relying on the prosecutor's closing arguments. Pet. at 7. The prosecutor did state in one sentence that "The givens in this case are those aggravating circumstances that you found to exist in the first phase of these proceedings."

Trial Tr., 16-29 PageID#7729. It is axiomatic that closing arguments are not proper instructions to the jury as that duty is the sole province of the judge. It is routine to advise the jury both before and after closing arguments of counsel that the trial court will provide the jury with the law of the case. In fact, just before deliberations in the trial phase the court instructed the jury:

> It now becomes the duty of the Court to correctly instruct you on the law which applies to this case.
>
> It is your sworn duty to accept these instructions to apply the law as it is now given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

Trial Tr., 16-29 PageID#7650. Later the court then instructed the jury that "The evidence does not include the indictment, the opening statements or the closing arguments of counsel. Opening statements and closing arguments of counsel are designed to assist you, but they are not evidence." Trial Tr., 16-29 PageID#7653.

Even if this one sentence somehow instructed the jury it suffers from the same fatal flaw. The prosecutor never defined what aspects of the jury's verdicts constituted an aggravating circumstance. The jury still had no idea what to put on death's side of the equation.

The Warden's argument demonstrates the error - at no point was the jury clearly, directly, and overtly instructed what constituted an aggravating circumstance in the case and how and what to weigh on death's side of the scale. This was a clear and plain error depriving Hutton of his Eighth Amendment rights to guided jury discretion before sentencing him to death.

REASONS FOR DENYING CERTIORARI

I. The Court of Appeals Properly Reviewed Miscarriage of Justice Standards to Lift the Procedural Default.

The Court of Appeals properly applied the limited manifest injustice standard announced in *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992). In *Sawyer*, the Court held that "the 'actual

innocence' requirement must focus on those elements that render a defendant eligible for the death penalty." *Id.* The Court of Appeals did exactly that in finding a fundamental miscarriage of justice to lift the default. The element at issue is that defined by Ohio law: that aggravating circumstance outweighs the mitigating factors. Ohio law specifically restricts the jury's consideration to specific, enumerated aggravating circumstances. *State v. Wogenstahl*, 75 Ohio St.3d 344, 355 (1996); O.R.C. § 2929.04(A)(1). At the time of Hutton's trial O.R.C. § 2929.03(D)(2) directed:

> If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

It is clear that, absent a jury's unanimous finding that the aggravating circumstance outweighs the mitigating factors the State did not carry its burden of proof to enhance the sentence from a term of years to death. This is the very definition of an element. *Schad v. Arizona*, 501 U.S. 624 (1991). It is axiomatic that the State must prove every element of the offense beyond a reasonable doubt in order to obtain a conviction. *In re Winship*, 397 U.S. 358 (1970). *See also Richardson v. United States*, 526 U.S. 813 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Glover v. United States*, 531 U.S. 198 (2001); *Ring v. Arizona*, 536 U.S. 584 (2002). This Constitutional dictate includes the requirement that the state prove every fact necessary to enhance a sentence beyond the statutory maximum. *Apprendi*, 530 U.S. at 490. This specifically includes any facts necessary to make the defendant eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Ring*.

This Court continues to recognize the importance of the Great Writ and the duty of the federal courts to give substantive review to *habeas* petitions. *See Miller-El v. Dretke*, 545 U.S. 231

(2005); *Williams v. Taylor*, 529 U.S. 362 (2000). Even under the AEDPA changes to the Great Writ, "the province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137 (1803). The Court specifically recognized that ceding federal review to the states would render AEDPA unconstitutional. *Williams*, 529 U.S. at 378-79. *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing.") (emphasis in original). The Court of Appeals simply refused to abdicate its duty under *Marbury* and determined that a death sentence predicated on a total failure to instruct the jury on the definition of aggravating circumstances constituted a fundamental miscarriage of justice. *Hutton v. Mitchell*, 839 F.3d 486, 497 (6th Cir. 2016) ("This would abdicate our role as judges to independently review the case before us.") In this regard the Court of Appeals followed the most fundamental Eighth Amendment cases: *Furman v. Georgia*, 408 U.S. 238 (1972); and *Gregg*. Rather than reworking *Sawyer* the Court of Appeals applied the Court's test to this case.

In order to manufacture a claim that the Court of Appeals violated *Sawyer* the Warden artificially breaks down *Sawyer* until it is unrecognizable. There is simply no "eligibility" versus "weighing", "factual" versus "legal" innocence or "gateway" versus "Constitutional claims" distinction in *Sawyer*. *Sawyer* speaks only of "elements that render a defendant eligible for the death penalty." *Sawyer*, 505 U.S. at 347. Actual innocence of the death penalty does not require or even implicate the trial phase determination of guilt. *Sawyer*, 505 U.S. at 343. "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance *or that*

some other condition of eligibility had not been met." *Id.*, at 345 (emphasis added). The Court of Appeals properly identified the element (a valid jury determination that aggravating circumstance outweighed mitigating factors), determined that this element was lacking and therefore, Hutton was innocent of the death penalty. Although the Warden repeatedly attempts to recast the Court of Appeals opinion into an application of *Ring v. Arizona*, the Court of Appeals did not decide this matter under *Ring* but under the Eighth Amendment foundational law of *Gregg v. Georgia*. It is through the lens of *Gregg* that the fundamental miscarriage of justice is revealed. This review was entirely consistent with both the letter and the spirit of *Sawyer*, *Sawyer*, 505 U.S. at 341-342 (citing *Gregg*), as well as the historical purpose of *habeas* review. *See Wainwright v. Sykes*, 433 U.S. 72, 91 (1977).

Because the Court of Appeals's decision does not contradict or misapply the Court's directions in *Sawyer* the Warden resorts to a parade of horribles flowing from the Court of Appeals's decision. As outlined below, this parade of horribles is non-existent.

The Warden attempts to create an issue by conflating a proper statement of Ohio law with the full requirements of Ohio law and with the facts of what happened in Hutton's trial. The Warden is correct that the jury must find beyond a reasonable doubt that the defendant is guilty of aggravated murder and is guilty of at least one statutorily defined aggravating circumstance. O.R.C. § 2929.03(B) - (C) (1985). What the Warden does not address is that under Ohio law the jury must make a separate and distinct finding before a defendant can be sentenced to death. The jury must find beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors. O.R.C. § 2929.03(D)(2). If the jury does not reach this finding, regardless of the reason, the defendant cannot be sentenced to death. As with a guilty verdict, a verdict against death is an acquittal of the death sentence. Innocence of the death penalty is shown when "some

other condition of eligibility had not been met." *Sawyer*, 505 U.S. at 345. Because the jury was never instructed what it could consider on death's side of the equation, the prime condition of eligibility for a death sentence was not reached: Hutton is innocent of the death penalty.

Although the foundation of Hutton's claim is a legal, Constitutional challenge, it is also a factually based claim. The legal issue surrounds the requirements under Ohio law and the Constitution in guiding a jury's discretion to consider a death sentence. *Gregg*. Because the trial court failed to instruct the jury about its duties and limits in considering the state's case for death Hutton's Eighth Amendment right to guided jury discretion was violated.

For purposes of miscarriage of justice analysis the claim also involves factual review of the impact of the error. Just because these issues involve the same set of facts does not mean that the Court of Appeals improperly considered the issue of factual innocence. Rather, the specifics of what the jury did not find is the factual innocence proof. The jury never found that the aggravating circumstance outweighed the mitigating factors because the jury was never given a definition of an aggravating circumstance. The question for miscarriage of justice is whether the execution would be a miscarriage of justice, not whether the error that occurred was a miscarriage. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). But, as in *Schlup*, the evidence to lift the default can be the same evidence that supports the underlying Constitutional violation. In *Schlup* the evidence of innocence was predicated on the same evidence that demonstrated the *Brady* violation.

In a final effort to obtain this Court's review the Warden attempts to fabricate a conflict in the circuits that simply does not exist. The cases proffered by the Warden simply do not address the issue reviewed by the Court of Appeals in this case. One of the cases does not even apply *Sawyer* but simply evaluates a state's procedural default as an independent and adequate state rule. *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010). The other cases, *McKay v. United States*, 657 F.3d

1190 (11th Cir. 2011); *Wooten v. Norris*, 578 F.3d 767 (8th Cir. 2009); and *Black v. Workman*, 682 F.3d 880 (10th Cir. 2012), simply address the impact of *Sawyer* on claims that additional evidence would have changed a sentencing calculation. Those cases have no application to an eligibility based *Sawyer* review. There is simply no conflict to be resolved by this Court.

Alternative Grounds for Relief

The remains an independent ground to lift the procedural default. Throughout proceedings on both direct appeal and state post-conviction Hutton was represented by attorney David Doughten. Doughten came onto Hutton's case in the Ohio Supreme Court at direct appeal. This was the appeal in which *sua sponte* three Justices addressed the jury instruction issue and determined that Hutton was entitled to relief. *State v. Hutton*, 53 Ohio St.3d 36, 50-51 (1990). Because Doughten had not raised or briefed this issue four Justices refused to address the issue and imposed a procedural default. *Id.*, 53 Ohio St.3d at n.1.

After the direct appeal proceedings concluded Doughten represented Hutton in state post-conviction proceedings. *State v. Hutton*, 2004-Ohio-3731, 2004 Ohio App. Lexis 3356 (8th Dist. 2004). Doughten did not raise either ineffective assistance of trial counsel for failing to object to the fatally flawed jury instructions or the ineffective assistance of appellate counsel for failing to raise either the merits of the jury instructions or the issue of ineffective assistance of trial counsel. Doughten failed to raise these claims in spite of the Ohio Supreme Court's refusal to consider the claim because neither trial counsel nor appellate counsel had raised the issue. Of course Doughten could not be expected to raise ineffective assistance of appellate counsel because he was appellate counsel. *See State v. Cole*, 2 Ohio St.2d 112, 114 (1982). Doughten's failure to raise this issue serves as cause and prejudice to lift any procedural default. *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013).

Ohio has a unique procedure whereby ineffective assistance of appellate counsel claims can be litigated. Ohio App.R.26(B). A timely application was filed raising the issue of Doughten's ineffective assistance on direct appeal. Although the court of appeals dismissed the application because the issue of ineffective assistance of counsel could have been raised on an earlier appeal the Ohio Supreme Court reversed that judgment and addressed the merits of the ineffective assistance of appellate counsel claims. The issue is exhausted and not procedurally defaulted and can serve as cause and prejudice to lift the procedural default. *Edwards v. Carpenter*, 529 U.S. 446 (2000).

When the matter moved to federal court Doughten was appointed by the district court to represent Hutton in his habeas litigation. D.Ct. Order and Opinion, Case No. 1:05-cv-2391, Doc. 67, PageID#1614. Doughten did raise the issue of the flawed jury instructions as the Eighth Claim for Relief, Amended Petition, Case No. 1:05-cv-2391, Doc. 60, PageID#1362, and the ineffective assistance of appellate counsel for failing to raise the related issues as the Eleventh Claim for Relief. Amended Petition, Case No. 1:05-cv-2391, Doc. 60, PageID#1366-1370.

After the district court denied the petition finding the jury instruction issue defaulted, Doughten filed a motion to alter or amend judgment pursuant to Fed. R. Civ.P. 59(e) raising the issue of his conflict of interest that prevented him from raised issues of his own ineffectiveness in state court proceedings as cause and prejudice based on *Martinez* and *Trevino*. The District Court denied this motion. Doc. 71.

The matter proceeded on appeal to the Sixth Circuit where Doughten was permitted to withdraw from the case and the undersigned counsel were appointed. The Sixth Circuit rejected the merits of Hutton's ineffective assistance of counsel claim holding that appellate counsel was not deficient in failing to raise the claim because other claims were raised. *Hutton*, 839 F.3d at

500-501. The Court of Appeals referenced *Jones v. Barnes*, 463 U.S. 745 (1983), for the proposition that appellate counsel is not required to raise every possible issue in order to be effective. *Hutton*, 839 F.3d at 501.

The failure of counsel to raise the jury instruction issue at any point in the litigation either before but certainly after the Ohio Supreme Court review in which three justices found grounds for relief on that issue is deficient performance. This was not a questionable or weak claim for relief. There is simply no excuse for counsels' failure to raise this claim. The Court of Appeals's logic is extracted from *Barnes* that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible." *Barnes*, 463 U.S. at 752. But *Barnes* was not a capital case and the Court has historically and not infrequently held that "death is different." *See e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). In 1983, 11 years after Furman had been decided, Justice O'Connor observed that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-999; at 999, n. 9 (1983) (citing cases). *See also, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases"); *Gardner*

v. Florida, 430 U.S. 349, 357-358 (1977) (Stevens, J., plurality opinion) ("From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

> Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.

Standard 4-1.2(c) of the ABA Standards for Criminal Justice (3d ed. 1991). Counsel in capital cases clearly have a different responsibility, duty, and standard than counsel in non-capital cases. Winnowing issues, especially an issue that definitively removes the defendant from death row, is not an option.

And modern capital practice mandates that attorneys recognize what has long been recognized: that the death penalty itself is not a static reality but is fluid and evolving. Issues that are not 'winning issues' today may be a client's saving grace tomorrow. *Compare Ring v. Arizona*, 536 U.S. 584 (2002), with *Walton v. Arizona*, 497 U.S. 639 (1990); *Atkins v. Virginia*, 536 U.S. 304 (2002), with *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Roper v. Simmons*, 543 U.S. 551 (2005), with *Stanford v. Kentucky*, 492 U.S. 361 (1989). In *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987), Justice Scalia wrote for a unanimous Court: "We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)."

At the time sixteen men had been executed in Florida under this Constitutionally flawed statute and all had challenged the statutory scheme in the same way as Hitchcock. He was granted relief and is alive today while the other sixteen were executed.

Nor is there any evidence that counsel made a strategic decision in failing to raise this issue. The failure to develop the factual predicate necessary to show that counsels' failure was based on error and not strategy lies with attorney Doughten who did not, and could not, investigate his own ineffectiveness.

Hutton was clearly prejudiced by counsels' failures. The majority of the justices on the Ohio Supreme Court refused to consider this issue because counsel did not raise it. But three justices, even under plain error review, found the claim meritorious. Had the issue been properly raised and litigated there is a reasonable probability that the outcome of the appeal would have been different. This constitutes prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court should deny the Warden's petition because there are alternative grounds upon which the Court of Appeals's decision is valid.

II. The Court of Appeals Properly Reviewed this Claim under the Eighth Amendment Requirements for Guided Jury Discretion in Capital Cases.

The Warden's second claim for review rests on miscasting both the Court of Appeal's decision in converting it from an Eighth Amendment decision to a Sixth Amendment decision and the requirements under Ohio law for eligibility for a death sentence. Because the Court of Appeals properly applied the Eighth Amendment to an Eighth Amendment issue review by this Court is not warranted. Additionally, Ohio law requires a jury finding that the aggravating circumstance outweighs the mitigating factors before a defendant is eligible for a death sentence. Absent that finding the defendant is not eligible for a death sentence and the court must sentence the defendant to a life term.

The Court of Appeals appropriately began the analysis of this error with *Gregg v. Georgia*, 428 U.S. 153 (1976). The Eighth Amendment requires that juries be strictly controlled in deciding to sentence a defendant to death. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg*; *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring). This is the core difference between an Eighth Amendment claim under *Gregg* and a Fourteenth Amendment claim under *McGautha v. California*, 402 U.S. 183 (1971). The jury instructions found acceptable in *McGautha* under the Fourteenth Amendment were found Constitutionally flawed in *Furman* and *Gregg* under the 8th Amendment. Because the trial court did not instruct the jury what constituted an aggravating circumstance the jury was left to unfettered discretion to place anything on death's side of the equation.

Under Ohio law the jury's decision that an aggravating circumstance outweighs the mitigating factors is a predicate fact necessary to impose a death sentence. Absent a unanimous jury verdict for death the maximum sentence that could be imposed was a term of years. O.R.C. § 2929.04(D)(2). Because the jury was not instructed at all as to the definition of aggravating circumstance the jury did not unanimously find beyond a reasonable doubt that the prosecution carried its burden. *In re Winship*, 397 U.S. 358 (1970). *See also Richardson v. United States*, 526 U.S. 813 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Schad v. Arizona*, 501 U.S. 624 (1991). Although these cases address a Sixth Amendment right to jury verdict, the Court of Appeals properly recognized the Eighth Amendment implications as outlined in *Furman* and *Gregg*. *Hutton*, 839 F.3d at 500. Clearly established Eighth Amendment law requires juries to be properly instructed on the factors to be put on death's side of the equation. *Gregg*. Because the core Eighth Amendment concern in capital sentencing is avoiding arbitrary and capricious death sentence we mandate guided discretion in capital cases. "As a general

proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg*, 428 U.S. at 195. Absent the proper instruction Hutton's jury was never guided in its discretion to impose death.

The Ohio Supreme Court held that the facts necessary to impose a death sentence under "Ohio's capital sentencing scheme" include "the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence." *State v. Hoffner*, 102 Ohio St.3d 358, 369 (2004) (citing Ohio Rev. Code § 2929.03(B) and (D)). Ohio law "charges the jury with determining" those facts "by proof beyond a reasonable doubt." *Id.* Thus, the weighing of aggravating and mitigating circumstances is a finding of fact in Ohio. *Id.*; *accord Rauf v. State*, 145 A.3d 430 (Del. 2016). *Hurst* mandates that a jury must make such factual findings. *Hurst v. Florida*, 136 S.Ct. 616, 624 (2016) (holding that a defendant's Sixth Amendment jury trial right was violated since, without judicial fact-finding, the defendant was ineligible for the death penalty); *see also State v. Kirkland*, 140 Ohio St.3d 73, 107-109 (2014) (O'Neill, J., dissenting).

This creates a serious and constitutionally impermissible likelihood that one who is not guilty of death may nevertheless receive a death sentence because the jury did not know what it could and could not consider on death's side of the calculus.

> At the beginning of our Republic and throughout most of its history, defendants did not go to the gallows unless juries said they should. And the role of the jury was seen as especially important when a defendant's life was in the balance, because it made sure that a defendant would suffer the ultimate punishment only if twelve members of the community deliberated together and unanimously concluded that should be so. . . . As the U.S. Supreme Court has long recognized, death is different. The proposition that any defendant should go to his death without a jury of his peers deciding that should happen would have been alien to the Founders, and starkly out of keeping with predominant American practices as of the time of *Furman* itself.

Rauf v. State, 145 A.3d 430, 437-438 (Del. 2016) (Strine, C.J. concurring). *Gregg*'s and *Hurst*'s effect in a case like this is inescapable: when a defendant invokes his right to a jury trial and is then deprived of his right to a proper jury instruction on the ultimate question of life or death, the only constitutional remedy is a new, fair, sentencing hearing at which the jury can decide his fate in accordance with the Sixth and Eighth Amendments.

As the Court of Appeals recognized, there is a clear difference between a case in which a jury is properly instructed on the aggravating circumstances and only later is one of those aggravating circumstances declared invalid and a case in which the jury is not instructed at all about what to consider in favor of death. The first situation can be addressed by full and proper appellate reweighing. *Clemons v. Mississippi*, 494 U.S. 738 (1990). The second situation can only be addressed by invalidating the resulting death sentence as arbitrary and capricious. *Furman*; *Gregg*. The two errors are systemically different and the Court of Appeals properly recognized the differences in reviewing Hutton's claim.

IV. Conclusion

For the reasons outlined above, the Warden's Petition for Writ of Certiorari attempts to manufacture errors that simply did not occur in the Court of Appeals's review of Hutton's case. At its core, the Warden's Petition is nothing more than an appeal to the Court to take another look at the case for the sole reason that the Warden lost. This is not a valid basis for review. Therefore, Mr. Hutton requests the Court deny the Warden's Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 16-1116

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLOTTE JENKINS, Warden,
PETITIONER,

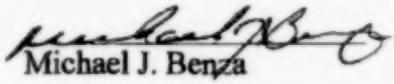
v.

PERCY HUTTON,
RESPONDENT.

As required by Supreme Court Rule 33.1(h), I certify that the Brief in Opposition to Petition for a Writ of Certiorari contains 5150 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2017.



Michael J. Benza

No. 16-1116

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLOTTE JENKINS, Warden,
PETITIONER,

v.

PERCY HUTTON,
RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the enclosed Respondent's Motion to Proceed In Forma Pauperis and Brief in Opposition were served via first-class U.S. mail, postage prepaid, on this 1st day of May, 2017 upon:

Eric E. Murphy
State Solicitor
30 E. Broad Street, 17th Floor
Columbus, OH 43215

All persons required to be served have been served.

Michael J. Benza

RECORD AND BRIEFS

No. 16-1116

In the Supreme Court of the United States

CHARLOTTE JENKINS, Warden,

Petitioner,

v.

PERCY HUTTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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During the guilt phase of Percy Hutton's capital trial, a jury found him guilty of two aggravating circumstances that made him death-penalty eligible. At the penalty phase, the jury found that the aggravating circumstances outweighed the mitigating factors and recommended a death sentence. The Sixth Circuit granted Hutton relief from this sentence because the penalty-phase instructions purportedly failed to tell the jury that the two aggravating circumstances that it had found at the *guilt* phase were the ones to be balanced against the mitigating factors at the *penalty* phase. The Sixth Circuit reached this procedurally defaulted jury-instruction claim under a theory—the actual-innocence exception—that Hutton never argued. And it held that appellate reweighing could not cure the purported instructional error by extending the jury-trial rule from *Ring v. Arizona*, 536 U.S. 584 (2002), to a jury's weighing-stage finding that the aggravating circumstances outweigh the mitigating factors.

The petition demonstrated that the decision below broke new ground in two dramatic respects, and so merits this Court's attention. *First*, the Sixth Circuit's surprise holding that Hutton is "actually innocent" of the death penalty conflicts with this Court's cases and with circuit cases. *Second*, the Sixth Circuit's extension of the Sixth Amendment's jury-trial guarantee into a capital trial's weighing stage likewise conflicts with this Court's cases and with cases from other appellate courts.

Hutton's responses do nothing to diminish the magnitude of the Sixth Circuit's legal errors. The Court should grant the petition for certiorari.

I. HUTTON CANNOT RECONCILE THE CONFLICTS CREATED BY THE SIXTH CIRCUIT'S ACTUAL-INNOCENCE HOLDING

The petition showed that the Sixth Circuit's application of the actual-innocence exception to procedural default conflicts with this Court's cases and with other circuit decisions. Hutton's arguments do not reconcile these conflicts.

A. Hutton's Arguments Conflict With *Sawyer*

The actual-innocence exception applies in rare cases in which a habeas petitioner can "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Hutton's expansive reading of *Sawyer*'s exception is incompatible with that case.

1. *Eligibility v. Weighing Stage.* The petition explained that *Sawyer* limited the actual-innocence exception to death-penalty *eligibility* factors, and refused to extend it to *weighing* factors concerning whether the aggravating circumstances outweigh the mitigation evidence. Pet. 19. Hutton responds that *Sawyer* contains "no 'eligibility' versus 'weighing'" distinction. Opp. 5. That is incorrect. *Sawyer* held that "the 'actual innocence' requirement must focus on those elements that render a defendant *eligible* for the death penalty." 505 U.S. at 347 (emphasis added).

Hutton retorts that the weighing of aggravating and mitigating circumstances *itself* is an "element" of death-penalty eligibility under *Sawyer*. Opp. 4-7.

Yet *Sawyer* rejected an extension of the exception into the weighing stage, where the jury makes "the ultimate discretionary decision between the death penalty and life imprisonment." 505 U.S. at 343. It expressly identified this proposed extension as the "most lenient" view of the exception, *id.*, but then went on to *reject* that lenient view, *id.* at 345-47.

To claim the contrary, Hutton identifies a sentence from *Sawyer* that the exception can apply if "'there was no aggravating circumstance'" *or* if "'*some other condition of eligibility had not been met.*'" Opp. 5-6 (quoting *Sawyer*, 505 U.S. at 345). The reference to "some other condition of eligibility" does not expand the exception into the weighing stage. *Sawyer* explained that "the term 'innocent of the death penalty'" turned on proof that would be "confined by . . . statutory definitions to a relatively obvious class of relevant evidence." 505 U.S. at 345. While the state law in *Sawyer* used the phrase "aggravating circumstance" to narrow the eligible class, *id.* at 341-42, *Sawyer*'s reference to "some other condition of eligibility" merely recognized that the "[s]tatutory provisions for restricting eligibility may, of course, vary from State to State," *id.* at 345 n.12.

Hutton is also wrong that the weighing of aggravating and mitigating circumstances is a condition of eligibility *under Ohio law*. Weighing does not occur in Ohio until "*after* the fact-finder has found a defendant guilty of one or more aggravating circumstances." *State v. Belton*, __ N.E.3d __, 2016-Ohio-1581 ¶ 59 (Ohio 2016), *cert. filed* (Mar. 24, 2017) (No. 16-8526). Those aggravating circumstances make a defendant "eligible for a capital sentence." *Id.* The

subsequent weighing does not "'increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Id.* ¶ 60 (citation omitted).

2. *Legal v. Factual Innocence.* The petition explained that *Sawyer*'s exception turns on a petitioner's factual innocence of an eligibility factor. Pet. 16-17. In response, Hutton *nowhere* claims that he did not kidnap Derek "Ricky" Mitchell or kidnap and attempt to kill Samuel Simmons, Jr.—the *factual* underpinnings of the aggravating circumstances that made him death-penalty eligible. Opp. 1-15. Indeed, Hutton admits that "the foundation of [his] claim is legal." Opp. 7. But he argues that his claim "is also a factually based claim" because "the specifics of what the jury did not find is the factual innocence proof." *Id.* This mystifying sentence appears to be another way of saying that Hutton relies on a legal error (a purportedly erroneous jury instruction) to excuse his default. *Even if* the jury did not rely solely on the two aggravating circumstances from the guilt phase, Hutton bore the burden of presenting new evidence that he did not *factually commit* those circumstances. *See Calderon v. Thompson*, 523 U.S. 538, 559-60 (1998). Thus, he does not reconcile the decision below with *Sawyer*'s teaching that "the miscarriage of justice exception is concerned with actual as compared to legal innocence." 505 U.S. at 339.

3. *Gateway v. Constitutional Claim.* The petition explained that an actual-innocence claim is distinct from a constitutional claim. Pet. 17, 20-21. Citing *Schlup v. Delo*, 513 U.S. 298 (1995), Hutton responds that "the evidence to lift the default can be the same

evidence that supports the underlying Constitutional violation." Opp. 7. True enough. But while the *evidence* supporting an actual-innocence claim may also support a constitutional claim, *Schlup* clarifies that the *claims* are distinct. 513 U.S. at 315-16.

In that case, the petitioner argued that evidence of his innocence had been withheld by the State (a *Brady* claim) and inadequately developed by counsel (a *Strickland* claim). *Id.* at 307. Both claims were defaulted. *Id.* at 307-09. The Court began its analysis by noting the "important" distinction between the petitioner's "procedural" argument (the default should be excused because he did not commit the murder) and his "substantive" claims (*Brady* and *Strickland*). *Id.* at 314. "His constitutional claims [were] based not on his innocence, but rather on his contention that the ineffectiveness of his counsel . . . and the withholding of evidence by the prosecution . . . denied him the full panoply of protections afforded . . . by the Constitution." *Id.*

In this case, by contrast, Hutton has a defaulted constitutional claim of error but *no* gateway claim of innocence to overcome his procedural default. "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Id.* at 316.

B. Hutton Cannot Minimize The Circuit Conflicts

The petition explained that the Sixth Circuit's expansive view of the actual-innocence exception con-

flicts with many circuit decisions. Pet. 22-27. In response, Hutton distinguishes a few cases on fact-specific grounds. Opp. 7-8. He ignores many other cases cited by the petition, and does not reconcile the decision below with the cases that he cites.

Hutton initially distinguishes *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010), because it "evaluate[d] a state's procedural default [rule] as an independent and adequate state rule." Opp. 7. Yet the rule in *Rocha* "'codif[ied], more or less, the doctrine found in *Sawyer*.'" 626 F.3d at 822 (citation omitted). Thus, the Fifth Circuit identified "[t]he precise meaning of the phrase 'actually innocent of the death penalty,' as defined by" *Sawyer*. *Id.* at 823. And it concluded that *Sawyer* "expressly rejected the argument that a constitutional error that impacts only the jury's *discretion* whether to *impose* a death sentence upon a defendant who is unquestionably *eligible* for it under state law can . . . excuse" a default. *Id.* (internal quotation marks omitted). That reading conflicts with the Sixth Circuit's opinion—which held that *Sawyer* extends into the discretionary weighing phase.

Hutton distinguishes other cases as "address[ing] the impact of *Sawyer* on claims that additional evidence would have changed a sentencing calculation." Opp. 7-8. He ignores the *reason* that these courts rejected that evidence: The actual-innocence exception does *not* reach the weighing of aggravating and mitigating factors. "[E]ven if state law considers the outweighing of mitigating circumstances by aggravating circumstances [to be] an 'element' of a capital sentence," the Tenth Circuit held, "it is not an element for purposes of the actual-innocence inquiry."

Black v. Workman, 682 F.3d 880, 916 (10th Cir. 2012). Likewise, the Eighth Circuit held that "courts may not consider the jury's penalty-phase balancing function" when analyzing actual-innocence claims. *Wooten v. Norris*, 578 F.3d 767, 781 (8th Cir. 2009). The Sixth Circuit held just the opposite.

All told, Hutton cannot square the decision below with these cases, or with many others cited in the petition. That circuit conflict warrants review.

C. Hutton's Alternative Ground For Excusing His Default Offers No Basis To Deny Review

Departing from the actual-innocence exception, Hutton alternatively argues that various ineffective-assistance claims show cause and prejudice to excuse his default. Opp. 8-12. As he did in the Sixth Circuit, he alleges that his *appellate* counsel was deficient for not raising the waived jury-instruction claim and a corresponding ineffective-assistance-of-trial-counsel claim. *Id.* He now appears to allege that his *state post-conviction counsel* was deficient for failing to raise the ineffectiveness of his trial and appellate counsel. *Id.* The Sixth Circuit properly rejected the appellate-counsel argument, and Hutton's new post-conviction argument is meritless.

1. *Direct-Appeal Claim.* Applying the deference owed to the Ohio Supreme Court under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Sixth Circuit correctly held that Hutton's appellate-counsel claim lacks merit under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 25a-27a; *id.* at 46a & n.2 (Rogers, J., dissenting). This claim

fails if "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). This is a "'doubly'" deferential test. *Id.* (citation omitted).

The Ohio Supreme Court reasonably concluded that appellate counsel acted reasonably. Pet. App. 254a-256a. Contrary to Hutton's suggestion, Opp. 10-11, this Court has declined to "impose on appointed counsel a duty to raise every 'colorable' claim." *Jones v. Barnes*, 463 U.S. 745, 754 (1983). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citation omitted). Here, it was not ineffective for counsel to decline to raise a jury-instruction claim that would have been subject to plain-error review. Pet. App. 255a. And with respect to the trial-counsel claim, the Ohio Supreme Court did not find that issue "'clearly stronger'" than the arguments that appellate counsel did present. Pet. App. 256a (citing *Robbins*, 528 U.S. at 288). That, too, was reasonable. Pet. App. 26a-27a.

Even if Hutton could show deficient appellate performance, he cannot show prejudice. *Strickland*, 466 U.S. at 692. As the district court noted, any jury-instruction error would have been cured by appellate reweighing under *Clemons v. Mississippi*, 494 U.S. 738 (1990). Pet. App. 162a-163a. So such an error could not have changed "the result of the trial." Pet. App. 163a-164a.

2. *Post-Conviction Claim.* Hutton's insinuation that his *post-conviction* counsel's ineffective assistance excuses the default also lacks merit. The rules

of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), do not provide any alternative basis for denying review here.

As a procedural matter, this argument is waived because Hutton failed to raise it below. *See Stewart v. LaGrand*, 526 U.S. 115, 120 (1999). *Martinez* and *Trevino* were decided before the district court ruled on Hutton's petition, but Hutton did not present timely arguments about those cases. *Hutton v. Mitchell*, No. 1:05-cv-2391, 2013 WL 4060136, at *2 (N.D. Ohio Aug. 9, 2013) (denying motion to amend judgment premised on *Martinez* and *Trevino*). And the Sixth Circuit rejected Hutton's request for a remand so that he could pursue *Martinez* issues. Order, 6th Cir. R.45, at 3.

As a substantive matter, Hutton's argument fails because (1) his trial-counsel claim should have been brought on direct appeal, and (2) his appellate-counsel claim was adjudicated on the merits in state court. Beginning with the trial-counsel claim, *Martinez* and *Trevino* do not apply in Ohio to ineffective-assistance claims that rely on the *trial record*. *Cf. Hill v. Mitchell*, 842 F.3d 910, 937 (6th Cir. 2016). In Ohio, those *record-based* claims are pursued on *direct appeal*. Thus, "[w]here [a] defendant, represented by new counsel upon direct appeal, fails to raise" record-based claims of ineffective assistance, "*res judicata* is a proper basis for dismissing [a] defendant's petition for postconviction relief." *State v. Cole*, 443 N.E.2d 169, 170 (Ohio 1982). As Hutton must concede by alleging ineffective assistance of *appellate* counsel for failing to raise the ineffectiveness of *trial* counsel, the jury-instruction and trial-counsel claims here are

record-based. It follows that they could *not* have been raised in a post-conviction petition. *Id.*

Switching to the appellate-counsel claim, an attorney *did* present this claim in a special application to reopen Hutton's direct appeal, and the Ohio Supreme Court rejected it on the merits. Pet. App. 26a, 247a-248a, 254a-256a. *Martinez* and *Trevino* "do[] not apply to claims that were fully adjudicated on the merits in state court because those claims are, by definition, not procedurally defaulted." *Morris v. Carpenter*, 802 F.3d 825, 844 (6th Cir. 2015).

In sum, Hutton's ineffective-assistance claims are either waived or meritless. They provide no reason for this Court to decline to resolve the circuit split concerning the actual-innocence exception.

II. HUTTON DOES NOT JUSTIFY THE SIXTH CIRCUIT'S EXTENSION OF *RING* TO BAR APPELLATE REWEIGHING OF A WEIGHING-STAGE ERROR

As the petition also showed, the decision below warrants review because it blurred the line between (1) errors concerning death-penalty eligibility (where the Sixth Amendment restricts appellate reweighing) and (2) errors concerning the discretionary decision of whether to impose the death penalty (where the Eighth Amendment permits appellate reweighing). Pet. 27-37. Here, at the guilt phase, the jury found two aggravating circumstances that made "Hutton's eligibility for the death penalty . . . indisputable." Pet. App. 48a-49a (Rogers, J., dissenting). Yet the Sixth Circuit relied on *Ring* and *Hurst v. Florida*, 136 S. Ct. 616 (2016), to hold that later errors during

the weighing stage could not be cured by appellate reweighing. Pet. App. 22a-25a.

Hutton's responses do not diminish the need for review. He simply doubles down on the Sixth Circuit's decision *on the merits*, arguing that a jury must find that "an aggravating circumstance outweighs the mitigating factors" because it is a "predicate fact necessary to impose a death sentence" within the meaning of the Sixth and Eighth Amendments. Opp. 13; *cf.* Pet. App. 39a n.1 (Merritt, J., concurring). This reading conflicts with this Court's cases, with cases from other circuits, and with Ohio law.

Start with this Court's cases. *Ring* held that, in capital cases, "any *fact* on which the legislature conditions an increase in the[] maximum punishment" must be found by a jury. 536 U.S. at 589 (emphasis added). Its holding did "not question the [state court's] authority to reweigh the aggravating and mitigating circumstances" under *Clemons*. *Id.* at 597 n.4. *Hurst* did not alter this framework. That is because, far from a factual question, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). And that is why the State can authorize a death sentence when the jury finds that the aggravating and mitigating circumstances are in equipoise. *See Kansas v. Marsh*, 548 U.S. 163, 165-66 (2006). Regardless, this *merits* issue is beside the point at this stage. Even if *Ring* or *Hurst* did overrule *Clemons* and *Marsh*, the Court should take this case to clarify the law in this important area.

In that regard, Hutton says *nothing* about the disagreement in the appellate courts on this issue. Pet. 35-37. Unlike the decision below, other cases have held that the Sixth Amendment does "not require a jury to do the weighing." *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007). The Alabama Supreme Court has held the same even after *Hurst*. *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5-6 (Ala. Sept. 30, 2016). Whether or not Hutton is correct on the merits, this judicial disagreement warrants the Court's attention.

Finally, this case provides a good vehicle to consider the question. Contrary to Hutton's argument (Opp. 13-14), state law does *not* require a jury to find that the aggravating circumstances outweigh the mitigation evidence to make a defendant death-penalty *eligible*. In Ohio, "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment, because '[it] cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Belton*, 2016-Ohio-1581 ¶ 60 (citation omitted). Instead, weighing "amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible." *Id.* (citation omitted). To claim the contrary, Hutton ignores *Belton*, invoking in its place a random Delaware case and an Ohio dissent. Opp. 14. But Ohio is not Delaware, and dissenting opinions are not majority opinions. *Belton* shows that Hutton cannot insulate this federal question from review under any state-law theory.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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